National Football League Management Council and the Constituent Member Clubs of the National Football League *and* National Football League Players Association, AFL–CIO

The Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys *and* National Football League Players Association, AFL–CIO

Chicago Bears Football Club, Inc., d/b/a Chicago Bears *and* Steve Fuller. Cases 5–CA–19170, 5–CA–19508, 5–CA–19559, 5–CA–19415, and 5–CA–19773

September 30, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

This case presents significant questions arising from the 1987 strike by the National Football League's professional football players.[1] These include: whether the Respondents lawfully adopted and enforced a rule requiring strikers to report for work by Wednesday of a given week in order to be eligible to play in and be paid for the following weekend's games; whether the Respondents lawfully refused to pay the salaries of certain injured players during the strike; whether the Respondents unlawfully bypassed the Union and dealt directly with the employees; whether Respondent Dallas Cowboys unlawfully threatened to withhold deferred compensation from certain players on account of their participation in the strike; and whether the New England Patriots unlawfully threatened reprisal against strikers.

The Board has considered the exceptions in light of the record and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

I. FACTUAL FINDINGS

A. *Collective-Bargaining Agreements and Strikes During the Period 1971–1987*

The Union was certified in 1971 as the representative of the active and certain inactive players on the rosters of all National Football League clubs. Since 1971, the parties have negotiated successive collective-bargaining agreements, the most recent of which was effective from 1982 to 1987. Each of these agreements was signed after strikes of varying duration.

In 1982, the players struck for 57 days during the NFL season before an agreement was reached with the Respondents. The Respondents did not hire replacements during this strike. According to NFL Management Committee Executive Director Jack Donlan's uncontradicted testimony, the Respondent Clubs collectively lost $200 million as a result of the strike. Donlan also testified that the Respondents obtained state court injunctions prohibiting strikers from engaging in ''All Star'' games staged independently of the NFL.[4] There was no testimony concerning efforts by the players to maintain their physical condition during the 1982 strike.

During the 1982 strike, the Respondents determined that each Club had to play nine games in order for the season to have ''integrity.'' Because of certain scheduling requirements, this could be accomplished only if the strike were settled in time to play the games scheduled for November 22–23, 1982. The strike was settled on November 17, 1982, a Tuesday, and nearly all the strikers reported for work the following day.[5] All NFL

[1] On March 21, 1991, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel and the Respondents filed exceptions and supporting briefs, answering briefs, and reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt the judge's finding that Respondent National Football League Management Council and the 28 constituent member clubs—which are also respondents—are not a single employer. However, the Respondents conceded, the judge found, and we agree that the Respondents are jointly and severally liable for the violations found herein. For ease of reference only, we have referred in this decision to the Respondents collectively where appropriate.

The judge, in par. 7 of sec. III,C,2,g(4) of his decision, inadvertently stated, ''Davis must have been so advised that Price was going home''; we find he meant to state: ''Davis must have been so advised that Booth was going home . . . .''

We find it unnecessary to rely on *Clear Haven Nursing Home*, 236 NLRB 853 (1978), cited by the judge in sec. III,C,2,k of his decision. We note that *Clear Haven*, to the extent inconsistent, was overruled by the Board in *Independent Stave Co.*, 287 NLRB 740 (1987).

[3] The Respondents' request for oral argument is denied, as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] Each NFL player is required to sign a standard ''NFL Player Contract'' which provides, inter alia, that ''[w]ithout prior consent of club, player will not play football or engage in activities related to football otherwise than for club or engage in any activity other than football which may involve a significant risk of personal injury . . . club will have the right . . . to enjoin player by appropriate proceedings from playing football or engaging in football-related activities other than for club or from engaging in any activity other than football which may involve a significant risk of personal injury.''

[5] The Detroit Lions players did not report until November 18, 1982. The New York Jets did not allow their players to report until November 18, 1982, after the club was ordered to do so by then-NFL Commissioner Pete Rozelle. Both teams played the following weekend: the Lions lost to the Chicago Bears, 20–17, on a last-sec-

Clubs played a normal schedule of games the following weekend. Consistent with the Union's request, none of the returning strikers were given medical examinations or formal conditioning tests to determine their fitness to play football. Some Clubs asked players to indicate whether their physical condition had changed; however the parties stipulated that the Dallas Cowboys were the only Club which compiled or administered written conditioning tests.

B. *The 1987 Contract Negotiations and Strike*

The parties began negotiations for a successor to the 1982–1987 agreement early in 1987. These negotiations were unsuccessful and, on September 21, 1987, after the second week of regular season play, the players went out on strike. The Respondents immediately began hiring temporary replacements for the striking players. Because certain Clubs were unable to assemble complete teams in time for the games scheduled for September 27–28, 1987, the Respondents canceled those games.

The Respondents also substantially modified the NFL's complex personnel rules governing the hiring of players and their eligibility to play in a game. In 1987, the Respondents' (nonstrike) personnel rules permitted each Club to have no more than 60 players under contract between the start of preseason training camps and the completion of the football season (i.e., the Super Bowl). At any given time, each such player had to be classified by the Club on one of the following categories or lists: Active, Inactive, Reserve, or Exempt. The Active list and Inactive lists combined could not exceed 47 players and the Active list could not exceed 40.

A Club's Reserve list could consist of players who (1) retired while under contract, (2) did not report, (3) left the squad (quit team), (4) were injured, (5) were found physically unable to perform at the time of their training camp physical, (6) had a nonfootball injury or illness, (7) were in military service, (8) were drafted but never signed a contract, and (9) were suspended or declared ineligible or expelled from the NFL. Complex rules not material to this case restrict a Club's ability to move a player from certain of the reserve categories to active status.[6]

A player could be placed on the Exempt list only with the approval of the NFL Commissioner. Exempt players did not count against the Club's Active list limit but could practice with their Club. This list was used for players who failed to report to their Club at the prescribed time (e.g., players ''holding out'' in connection with contract negotiations), but in such cases the player's exempt status could last for only two games. Exemptions could also be granted for players who left their Club without permission after reporting, both for the time the player was absent and, if the Commissioner deemed it reasonable that the player was not in shape, for a period of time after the player returned.

Only players on a Club's Active list were eligible to play in a game. The Respondents' rules usually provide that, for games played on a Saturday or Sunday, each Club must establish its Active list for the game by 2 p.m. New York time the day prior to that game. For Monday night games, the deadline is 2 p.m. New York time the day of the game.

In response to the strike, the Respondents substantially modified these rules. On September 29, 1987, the NFL Management Council Executive Committee (CEC) eliminated roster limits until 4 p.m. New York time on October 3, 1987.[7] Clubs were permitted an unlimited number of players on their Inactive lists with a 45-player Active list limit for participating in the games on October 4–5. The deadline for establishing the Active lists was set at 4 p.m. New York time on October 3, and a deadline of 12 p.m. noon local time on Friday (October 2) was established for signing nonroster players. The CEC also established a deadline of 12 p.m. noon local time on October 2 for strikers to report in order to be eligible to play in the Sunday or Monday games.

On October 1, the above rules were modified to establish a 3 p.m. Friday New York time deadline for strikers to report in order to be eligible for that weekend's games or for Clubs to sign nonroster players.

On October 5, the CEC further modified its eligibility rules for returning strikers. The deadline for signing nonroster players was moved back to 4 p.m. New York time Saturday for teams playing on Sunday, and to 4 p.m. New York time on Monday for teams playing that night. For strikers, however, the reporting deadline was set at 1 p.m. New York time on Wednesdays. Strikers reporting after that time were not eligible to play in the following weekend's game, could not be paid for that game, and were exempt from counting against the Club's Active or Inactive list until 4 p.m. New York time on the day following that game.[8] This rule was in effect on Thursday October 15, when the Union advised the Respondents that the strike was over; on the basis of this rule all strikers who had not reported prior to the deadline were declared ineligible

ond field goal, while the Jets defeated the then Baltimore Colts 37–0.

[6] However, we note that these restrictions were substantially relaxed during the strike.

[7] All dates hereafter are in 1987 unless otherwise noted.

[8] The CEC's modified personnel rules provided that returning strikers would automatically be placed on Exempt status, and could be activated by their Clubs up to 4 p.m. New York time on the Saturday prior to subsequent games (subject to their having satisfied the striker reporting deadlines previously discussed).

to play in the games scheduled for October 18–19 and were not paid for that game.[9]

On October 16, the CEC modified its eligibility rules to return the eligibility deadline to prestrike status for the games on October 25–26. Clubs were allowed to retain up to 85 players on their Active and Inactive lists for those games, including all returned strikers not on the Reserve list. Clubs were permitted to activate players from their Inactive list until 5 minutes prior to kickoff if a player on the Active list refused to participate. Players on the Inactive list for the October 25–26 games were paid their contractual salary for that game.

The Respondents also established special rules for injured players during the strike. The standard ''NFL Players Contract'' essentially provides that a player injured in the performance of services to the Club is entitled to medical treatment, at the Club's expense, and to continuation of his salary for the rest of that season only, ''in accordance with the Club's practice.''[10] In general, injured players are expected to cooperate in any prescribed treatments or rehabilitation program, and to attend team meetings and practices to the extent requested and able to do so. However, with the advent of the strike, the Respondent CEC ordered Clubs not to pay injured players who did not report to team facilities or who picketed. The Clubs were also ordered to arrange for such players to continue to receive medical treatment at an offsite facility.

C. *Actions by the New England Patriots and the Dallas Cowboys*

On October 6, Billy Sullivan, an owner and official of Respondent New England Patriots, sent a letter to employee Lin Dawson concerning the players' participation in the strike. This letter stated, inter alia, that

> [I] cannot wait [sic] the conclusion of this event [the strike] to see if I can get someone else to buy the contracts of people who have acted in such an unfair manner.

Dawson, a quarterback, was the union player representative for the Patriots during the strike.

At various times during the 1987 strike, the Respondent Dallas Cowboys sent letters to striking employees Kevin Brooks, Tony Dorsett, Ed Jones, and Everson Walls stating that their participation in the strike would trigger provisions in their player contracts requiring the loss of deferred compensation payments, forfeiture of certain bonus payments, and acceleration of the repayment of certain loans. Brooks, Dorsett, and Jones crossed the picket line and returned to work after receiving the letters.

II. ANALYSIS

A. *Deadline Rule*

The judge found, and we agree, that the Union unconditionally offered to return to work on Thursday October 15.[11] For the reasons that follow, we find that the Respondents unlawfully discriminated against the strikers by maintaining and enforcing the Wednesday eligibility deadline to preclude their participation in or payment for the games played on October 18–19.

The Supreme Court has recognized that ''there are some practices which are inherently so prejudicial to union interests and so devoid of significant economic justification . . . that the employer's conduct carries with it an inference of unlawful intent so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose.'' *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965). If an employer's conduct falls within this category, ''the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.'' *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967).

On the other hand, if the impact on employee rights of the discriminatory conduct is

> comparatively slight, an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. Id. at 34.

Applying these principles to this case, we find as an initial matter that the Wednesday deadline rule clearly constitutes discriminatory conduct which adversely affects employee rights. On its face, the rule discriminates against strikers by applying different, and more

[9] In the NFL, a player's annual salary is divided into equal installments for each of the 16 regular season games, and paid on a biweekly basis.

[10] Injured players may be placed on the Club's ''Injured Reserve'' list under certain circumstances (as discussed more fully below), in which case they do not count against any applicable roster limit and may not be returned to the Active list except under circumstances specified in Respondents' personnel rules. However, clubs are not required to place injured players on ''Injured Reserve'' and their placement on ''Injured Reserve'' does not affect the obligations created by the player contracts.

[11] The Respondents contend that the Union's offer was not unconditional because it sought the termination of the replacements and the immediate reinstatement of all strikers. This assertion is without merit. *Hansen Bros. Enterprises*, 279 NLRB 741 (1986) (''where the striker replacements are only temporary, an offer to return to work which demands no more than the discharge of those replacements is perfectly appropriate'').

stringent, standards for eligibility to participate in NFL games (and to be paid for such participation). Moreover, the rule also adversely affects one of the most significant rights protected by the Act—the right to strike.[12] The Board and the courts, applying the principles of *Great Dane*, have long recognized that the right to strike includes the right to full and complete reinstatement upon unconditional application to return. *NLRB v. Fleetwood Trailer Co*., 389 U.S. 375, 380–381 (1967); see also *Laidlaw Corp*., 171 NLRB 1366, 1368–1369 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).[13]

As in *Laidlaw*, the Respondents—in reliance on their Wednesday reporting deadline—offered the striking employees who reported for work on October 15 ''less than the rights accorded by full reinstatement'' (i.e., the right to participate in the games scheduled for October 18–19 and to be paid for those games). *Laidlaw*, supra, 171 NLRB at 1368. Thus, the Wednesday deadline adversely affected the striking employees in the exercise of their right to strike or to cease participating in the strike, by prohibiting the full and complete reinstatement, for the October 18–19 games, of those employees who chose to return to work after the Respondents' deadline had passed.[14]

We need not decide whether, as the General Counsel contends, the Respondents' conduct was inherently destructive of employee rights. Even assuming that the impact on employee rights of the Wednesday deadline rule for strikers was ''comparatively slight,'' the burden still rests with the Respondents to establish ''legitimate and substantial business justifications'' for the rule. For the reasons that follow, we find that the Respondents have not made the required showing.[15]

The Respondents assert that the Wednesday deadline was justified by the Clubs' need for sufficient time to prepare returning players for game conditions. In this regard, the Respondents presented evidence that the strikers' physical condition would be expected to deteriorate as the strike progressed. In addition, NFL Management Council official Eddie LeBaron testified that players could not maintain their ''football condition'' without participating in practices involving physical contact.[16] The Respondents also assert that they particularly did not wish to risk injuries to so-called franchise players.[17]

The Respondents also assert that the rule is justified by their goal of ensuring that each Club operates from the same competitive position. Thus, the Wednesday deadline would give each Club the same amount of preparation time with returning players, prevent situations in which a replacement squad was ''mismatched'' against a squad composed of veterans who had reported late in the week, and ensure that Clubs could prepare for specific players during the Wednesday and Thursday practices when game plans were typically practiced.

Finally, the Respondents assert that the Wednesday deadline was justified in light of substantial administrative difficulties allegedly posed if strikers returned at a late date in the week. These alleged difficulties included the question of how to merge replacement squads and strikers, as well as the logistics of practicing and evaluating two squads of players at the same time and arranging transportation to away games for late-reporting players.

In evaluating the Respondents' justifications, we initially note the unprecedented nature of the Wednesday deadline and the absence of any evidence that the Respondents have imposed a deadline of this type on employees outside of a strike setting. In particular, the record shows that players who withheld their services in pursuit of individual goals (i.e., players holding out for a more lucrative contract) are not subject to comparable restraints on their status on their return. Rather, such players are eligible to play immediately so long as they are included in the Club's active roster.[18] If the

[12] The right to strike is expressly protected by Sec. 13 of the Act. In addition, Congress extended the Act's protections to strikers by including them within the definition of ''employee'' in Sec. 2(3). As the Supreme Court has said, ''this repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.'' *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 233–234 (1963).

[13] Of course, economic strikers who have been permanently replaced are entitled to reinstatement only as positions become open. The Respondents admit that they did not permanently replace the strikers in this case.

[14] The Board has recognized that placing former strikers in a subordinate or subservient class distinguished only by their exercise of statutory rights adversely affects employee rights. *Oregon Steel Mills*, 291 NLRB 185 (1988), enfd. 134 LRRM 2431 (9th Cir. 1989); *Transport Co. of Texas*, 177 NLRB 180 (1969), enfd. 438 F.2d 258 (5th Cir. 1971). See also *Lehigh Metal Fabricators*, 267 NLRB 568 (1983), enfd. 735 F.2d 1350 (7th Cir. (denying striking welders reinstatement in favor of assertedly better qualified nonstrikers unlawful); *Kansas City Power & Light*, 244 NLRB 620 (1979), enfd. pertinent part 641 F.2d 553 (8th Cir. 1981) (denying reinstated strikers credit for prestrike service toward completion of probationary period found unlawful).

[15] Accordingly, we also need not decide whether the General Counsel otherwise established that the rule was motivated by antiunion considerations. *NLRB v. Great Dane Trailers*, above, 388 U.S. at 34.

[16] The Respondents admit that LeBaron was the official primarily responsible for the decision to adopt the Wednesday eligibility rule for strikers.

[17] LeBaron identified franchise players as ''valuable products . . . that you depend on for the future of your ball club, the future of your franchise, Eric Dickerson, or people like that.''

[18] The record does not indicate whether a player who reports after the normal deadline for submitting active rosters for a game has

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Club determines that the player is not in shape to play, he may be placed on an Exempt list, as noted above. However, there is no automatic disqualification from participation in NFL games, or from being paid for a game while on the Exempt list, as was the case with the striking employees in 1987.[19] This is so whether or not the individual is considered a ''franchise player.'' Likewise, after the 1982 strike, players were immediately restored to their prestrike status—including players who did not report or practice until the Thursday prior to the next weekend's games. In this regard, NFL Management Council Executive Director Jack Donlan testified that the safety of returning players was not considered either way in 1982 because the NFL's goal of completing the season could only be accomplished if the games were played.

It is undisputed that the Wednesday deadline was only applicable to striking players. The Respondents could and did sign nonstrikers to contracts subsequent to the date the strikers were declared ineligible; the nonstrikers were eligible to play in and were paid for the October 18–19 games. Similarly, after the 1987 strike, Clubs retained a substantial number of replacement players on their Inactive lists for up to two games. Although not eligible to play to the extent that they were not activated, these individuals were paid for those games.

Under these circumstances, we find that the Respondents have not established legitimate and substantial justifications for the deadline rule.[20] While it may be true that some striking employees' physical conditioning declined during the strike, the same considerations were present in the case of holdouts and of replacement players.[21] Likewise, safety concerns did not preclude the immediate reinstatement of the striking players in 1982, even though they had been out for 57 days, while the 1987 strike lasted only 25 days. While most of the strikers in 1982 reported a day earlier in the week than was the case with most 1987 strikers, there is no evidence in the record to suggest that the extra day would be sufficient to overcome the far greater loss of conditioning one would expect after the longer 1982 strike.[22]

We also find that the Respondents' asserted competitiveness concerns are unpersuasive. Although the Respondents were entitled to ensure that all clubs operated under the same rules, adopting a deadline which discriminated against strikers was unnecessary to the achievement of this goal. The Respondents' argument that Clubs needed the practice time provided by the Wednesday deadline to prepare the strikers to play (and, for the purpose of those practices, needed to know who would be playing for its opponent) is contradicted by their willingness to allow nonstrikers with substantially less preparation time to play in those games.[23] Moreover, the Respondents' claim that late-returning strikers would have a disproportionate impact on the game unless Clubs had an opportunity to prepare their players to face them would seem to contradict their prior claim that these same players were so out of shape that it would be unsafe to play them. Again, in the case of returning holdouts, replacement players, and the players returning from the 1982 strike, competitiveness concerns did not dictate the imposition of an eligibility deadline like the Wednesday deadline

passed, and is not included on that roster, is normally paid for that game. However, the standard ''NFL Player Contract'' tolls the Club's obligation to compensate a player who becomes a member of the armed forces, retires, or ''otherwise fails or refuses to perform his services'' only until ''his return to professional football.''

[19] The Respondents' assertion that returned holdouts are not similarly situated to the 1987 strikers because only the former were ''eligible to be activated'' is an exercise in circular reasoning, as the deadline rule itself is the only reason the strikers were not similarly eligible. We also note that employees who abandoned the strike prior to October 15, 1987, were automatically placed on the Exempt list, which entitled them to be paid for subsequent games whether or not activated and allowed their Club to activate them up to 4 p.m. New York time on the Saturday before an upcoming game.

[20] In this regard, we reverse the judge's finding that the Respondents never committed themselves to paying the players even if they were ineligible to play. This finding ignores the uncontradicted evidence, set forth above, that the Respondents' obligation to compensate players is based on the terms of the NFL Players Contract, not their eligibility status, that ineligible players on the Inactive, Reserve, and Exempt lists are compensated in circumstances indistinguishable from those presented here.

[21] In this regard, there is substantial evidence that many players practiced as a group during the strike and also continued their physical conditioning programs on an individual basis. These activities were conducted in many cases at the direction of club officials, often using facilities and equipment which the Clubs arranged to be made available. Although there were no contact drills, such activities were prohibited by the NFL Player Contracts and the strikers had every reason to believe that the Clubs would enforce that prohibition. Under these circumstances, and considering that the Clubs did not administer any physical exams or conditioning tests after the strike, we find that the Respondents have not established that the strikers were not in sufficient physical condition to participate in an NFL game.

[22] We also note that, in 1982, the Lions and Jets did not practice until the Thursday prior to the first poststrike games, but nevertheless were not subject to any automatic ineligibility rule like that imposed by the Respondents on strikers reporting on Thursday October 15, 1987. Moreover, the record shows that the Lions and Jets played teams which had practiced for an additional day, without any apparent ill effect.

[23] The Respondents' competitiveness concerns are also belied by the substantial evidence that the strikers, who generally were veteran players familiar with their Clubs' offensive and defensive strategies, needed less preparation time than replacement players with little or no familiarity with these matters. In this regard, we note that the Board in *Laidlaw* found that ''the employer's preference for strangers over tested and competent employees is sufficient basis for inferring'' that its refusal to reinstate them was motivated by antiunion animus. *Laidlaw*, above at 1369 fn. 14. To the extent that the Respondents seek to justify the Wednesday deadline based on a preference for the replacement players we find that such preference is not a legitimate or substantial justification for the rule.

at issue here. We find that such concerns did not justify that deadline in 1987 either.

In addition, we find that the logistical and administrative burden of reinstating the strikers does not justify the rule either. In this regard, the Respondents' arguments are premised entirely on the burden of reinstating the entire 1100 player complement, even though the rule on its face would apply to a single striker who elected to return to work. The Respondents provide no justification for the application of the rule in these circumstances.[24] We also note that the Respondents maintained a substantial complement of replacement players well after the strikers had been fully reinstated. Accordingly, we find that any administrative burden associated with maintaining two separate squads for the games on October 18–19 is not a legitimate and substantial justification for the Wednesday deadline.

The Respondents also provide no explanation for the fact that the initial deadline for returning strikers, 12 noon on Friday (later modified to 3 p.m. New York time), would have provided the Clubs with less time to accomplish the reinstatement of returning strikers than they actually had when the strikers reported on October 15. To the contrary, LeBaron admitted that he did not take logistical problems into account when he set that deadline because he did not expect the strike to end at that time, and the Friday deadline gave Clubs more opportunity to obtain players, including striking players.

We also find unpersuasive LeBaron's testimony that, early in the strike a Friday deadline was appropriate because the strikers had been out for less than 2 weeks, but that ''suddenly you go past that two week cycle, and you're into the third week, and you start getting very concerned about their conditioning.'' Rather, we think the true explanation for the change is that, as LeBaron subsequently stated, the Respondents wanted a late reporting deadline early in the strike in order to assist them in assembling replacement teams. As LeBaron noted, ''if you can get a striking player, then you are better off.'' Only after the Respondents had assembled the replacement teams was a separate, earlier deadline viewed as desirable. Under these circumstances, we find that the Respondents' claimed logistical and administrative problems are not a legitimate and substantial justification for the Wednesday deadline.[25]

Finally, the Respondents assert that the Wednesday deadline was privileged by the rule established in the Board's *Drug Package Co.*[26] case, granting employers 5 days to reinstate unfair labor practice strikers. As the Respondents note, the October 18–19 games fell within 5 days after the Union's October 15 offer to return to work. However, the Respondents had already reinstated the strikers on October 15, when they were welcomed back, requested to ''immediately'' begin practicing under their Club's direction and paid a per diem if they did. We also note that the *Drug Package* holding was limited by the Board to orders for reinstatement and backpay for unfair labor practice strikers who had not sought reinstatement prior to the hearing. In contrast, ''where a Board order issues after unfair labor practice strikers have already made an offer to return which has been rejected by the employer, backpay runs from the date of the offer to return with no 5-day period allowed.'' *Drug Package*, above at 114. Even assuming that the *Drug Package* 5-day grace period for reinstatement applies to economic strikers, the Board has refused to give the benefit of any grace period to an employer who unduly delays or unlawfully denies reinstatement. *Aztec Bus Lines*, 289 NLRB 1021, 1030 fn. 23 (1988). For all the forgoing reasons, we find that the Respondents are not entitled to the *Drug Package* grace period for reinstating the strikers in this case.

In sum, the Respondents' Wednesday deadline prohibited employees who returned from the strike on October 15 from playing in the following weekend's games and prohibited their Club from paying them for that game on the basis of their absence from the Club during the strike. The only players subject to such restrictions were those who chose to participate in the strike, a concerted activity protected by the Act. Players absent from their Club for other reasons were not subject to any similar restriction on their eligibility to participate in games; players ineligible to play for other reasons were nevertheless still entitled to be paid. Accordingly, for the reasons stated above, we find that the Respondents' maintenance and enforcement of its

[24] Indeed, we note that the deadline rule was anomalous in other respects as well. Thus, as the judge noted, it was applied to preclude even specialty players such as kickers from participation in the games, notwithstanding the lack of any evidence that the Respondents' asserted justifications applied in their case. Likewise, the rule was applied to players on injured reserve throughout the strike even though those players would not have been eligible in any event and the only effect of the Wednesday deadline was to prevent them from receiving compensation to which they would otherwise have been entitled as injured players. The Wednesday deadline was also applied to players whose next scheduled game was on Monday, October 19, even though they had as much time to prepare for that game as players reporting by the Wednesday deadline had to prepare for a Sunday game. The Respondents admit that safety or logistical reasons could not justify the application of the rule to these individuals.

[25] In so holding, we are mindful that logistical or administrative problems can prevent an employer from immediately reinstating economic strikers who have not been permanently replaced. However, we decline to find that such considerations were present here, in light of the Respondents' demonstrated willingness and ability to reinstate nonstrikers and returning strikers in 1982 to active status under circumstances presenting the same alleged difficulties.

[26] 228 NLRB 108 (1977), enfd. in relevant part 570 F.2d 1340 (8th Cir. 1978).

Wednesday deadline rule violated Section 8(a)(1) and (3) of the Act.[27]

B. *Application of the Reporting Deadline Rule to the Injured Reserve Players*

The judge found that the Respondents' application of the Wednesday deadline rule to certain players on Injured Reserve, who reported to their Clubs after the October 14 deadline, violated Section 8(a)(3) and (1). For the reasons set forth above, finding that the Respondents' Wednesday deadline rule was discriminatory and without reasonable justification, we affirm the judge's finding that the application of the rule to the players on injured reserve was unlawful.[28]

C. *The Failure to Pay Injured Reserve Benefits*

Besides applying the deadline rule to injured players to deny them their pay for the last replacement game, the Respondents also withheld the salaries of 26 players on injured reserve during part or all of the strike period, on the ground that they were participating in the strike. The pertinent facts, as more fully set forth by the judge, can be summarized as follows.

''Injured Reserve'' is described by the NFL's constitution and bylaws as a category of the reserve list, that may be used by Clubs for a player ''who is injured in a practice session or game of his club in any year, after having passed the club's physical examination in that year.''[29] A player who is injured and subsequently placed on Injured Reserve by his Club is provided protection under the standard NFL Player Contract.

Paragraph 9 of the NFL Player Contract,[30] which governs obligations in the case of an injury to a player, provides in part that if a player is injured in the performance of his services under the contract and immediately reports the injury, he will receive medical care and, in accordance with the Club's practice, a continuation of his yearly salary for so long as he is physically unable to perform. Although the ''club's practice'' is not defined in the standard contract, the record reveals that this phrase refers to the fact that the clubs have established their own treatment and rehabilitation programs for injured players, which are supervised by their team physicians and trainers. Thus, injured players, once they are able to do so, are generally required to cooperate in treatment and rehabilitation, and to attend club meetings and practices to the extent requested.[31] Once a Club places a player on Injured Re-

[27] In light of our findings above, we find it unnecessary to rely on the adverse inferences which the judge drew from the Respondents' failure to produce certain documents or provide testimony concerning the motivations of the CEC in adopting the rule. Accordingly, we do not pass on the Respondents' exceptions in this regard.

Member Oviatt is not persuaded that the Respondents unlawfully refused to reinstate strikers under the 5-day rule. That rule, as pertinent here, provides an employer a 5-day grace period for the reinstatement of strikers; and the reason for a 5-day delay is not litigable. *Drug Package*, supra at 113–114 and fn. 28; also see *Newport News Shipbuilding*, 236 NLRB 1637 (1978), *National Car Rental Systems*, 237 NLRB 172 (1978). *Aztec*, supra, merely held that the delay there of 2 weeks or more in reinstating economic strikers was undue. There is no indication that the Board intended to reverse or to modify *Drug Packaging*. As the majority does not address the application of the 5-day rule to economic strikers, I shall not do so either, although no compelling reason to treat economic strikers more favorably than unfair labor practice strikers is immediately apparent to me.

[28] In reaching his conclusion, the judge found, inter alia, that the discriminatory aspect of the rule, and its lack of any reasonable justification, is even more evident in the context of its application to the injured reserve players. The judge stated that even if he had found that the reasons the Respondents offered for the rule were rational justifications as to players able to play in the games, those reasons would not logically apply to players on injured reserve. The judge found that the injured reserve players who offered to return could have been required to engage in rehabilitation at their Clubs' facilities and to attend practices where possible. The Respondents' asserted reasons for the rule, however, such as the need for additional time to get the players in condition to play, preventing the risk of injury to the players, competitive balance, and preparedness for play, could have been applicable only to players who were in a position to play, not to players on injured reserve who were not. We agree. See Member Oviatt's statement of position, supra, in the preceding footnote.

The judge found that player Lew Barnes defeased his rights to injured reserve benefits for the three replacement games, because he had failed to follow his Club's nondiscriminatory rehabilitation instructions. He also found that the Respondents properly withheld player Larry Emery's salary, because his injury was nonfootball-related (NFI), and he was therefore not entitled to compensation under the contract. The General Counsel excepts to these findings, contending that both players are entitled to payment for the last replacement game, after the Union's unconditional offer to return was made. We find no merit to these exceptions, as these players were not denied game checks on account of the strike, and our holding here does not alter the judge's findings in regard to these two players.

[29] If a player fails the Club's initial physical examination in any year, he is not eligible for Injured Reserve. The Club may instead use the procedures of Physically Unable to Perform (PUP) or Non-Football Injury/Illness (NFI), whichever is applicable. Article XVIII, secs. 2 and 3, of the 1982–1987 collective-bargaining agreement provide that any player placed on Reserve as PUP will be paid his full contract salary while on Reserve, and that any player placed on Reserve as NFI will not be entitled to any compensation.

[30] Par. 9 states that:

> If player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and, in accordance with Club's practice, will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the services required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary or, in the absence of a stated beneficiary, to his estate.

[31] The NFL constitution and bylaws provide that Injured Reserve players ''may attend team meetings and participate in practice sessions with Active List players as soon as physically able to do so.''

serve, he is required to remain on Injured Reserve for a minimum of 4 weeks, during which time he is not allowed to play in any games.

Paragraph 11 of the NFL Player Contract provides that, if the services rendered by the player are judged by the Club to be ''unsatisfactory as compared with that of other players competing for positions on the [c]lub's roster,'' the Club ordinarily may terminate the contract and release the player. However, under paragraph 9, if a football-related injury renders a player unable to perform, he is entitled to remain under contract, and receive medical care and his yearly salary. Thus, paragraph 9 serves not only as a protection from termination based on a comparison of skills, but also as a form of medical and financial insurance for players with football-related injuries that, but for the guarantees of paragraph 9, could subject them to termination.

Prior to the strike, each Club had a ''past practice'' with respect to treatment programs for injured players. Most Clubs provided rehabilitation at the Clubs' facility, but some Clubs allowed certain players to rehabilitate themselves away from the facility. With the commencement of the strike, however, the Respondents adopted new rules for the injured players by directing the Clubs to withhold the salaries of those injured players who failed to report to the Clubs' facilities or who engaged in picketing.[32]

The Respondents refused to pay 26 injured players who were on Injured Reserve or physically unable to perform status for some or all of the strike, on the grounds that these individuals were on strike. Salaries were withheld both from injured players who were directed by their Clubs to report to outside facilities for rehabilitation and from injured players who were directed by their Clubs to recuperate at home. The Respondents, despite the players' compliance with their directives to rehabilitate themselves at outside facilities or recuperate at home, nonetheless considered any injured player a striker if he did not cross the picket line or disavow his support for the strike. In some cases, players were advised by their Clubs that they would only be paid if they crossed the picket line. In yet other cases, players were told that they could not cross the picket line unless they resigned from the Union and disavowed support for the strike.

The judge, applying *Texaco, Inc*., 285 NLRB 241 (1987), found that the paragraph 9 injury payments were accrued benefits that were withheld on the basis of the strike in violation of Section 8(a)(3) and (1). The Respondents except, contending in principal that the paragraph 9 payments are not accrued benefits and, therefore, that they are not required to pay the benefits to striking employees. The Respondents contend instead that the payments are salary paid in consideration for an injured reserve player's required contractual services, such as rehabilitation, meeting attendance, and team practices where possible. We find no merit to the Respondents' exceptions, and we agree that the Respondents have violated the Act as alleged by the General Counsel.

In *Texaco*, the Board held that the question whether an employer violates Section 8(a)(3) or (1) by refusing to continue benefit payments to a disabled employee on commencement of a strike, will be resolved by application of the Supreme Court's *Great Dane* test.[33] As noted in section A, above, the General Counsel has the initial burden of proving at least some adverse effect of the benefit denial on the employees' exercise of their Section 7 rights. This burden can be met by showing that the benefit was accrued and was apparently withheld on the basis of the strike.[34] The burden then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits, by proving waiver, or by demonstrating reliance on a nondiscriminatory contract interpretation that is reasonable and arguably correct.[35] If business justification is proved by the employer, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be ''inherently destructive'' of important employee rights or motivated by antiunion intent.[36]

Proof of accrual is determined on a case-by-case basis and most often turns on interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice.[37] Thus, whether the General Counsel has met the prima facie burden of proving that the paragraph 9 injury payments were due and payable and therefore accrued on the dates the Respondents withheld them, depends on an interpretation of the obligations as set forth in the NFL Player Contract. As discussed above, the NFL Player Contract expressly provides the conditions for accrual of benefits under paragraph 9: a player must sustain a football-related injury, immediately report that injury, and be physically unable to perform. Once these conditions are met, the player is entitled to the benefits without doing anything more. As the judge correctly noted, proof of accrual without further performance is especially evident in two instances: (1) when a player dies, and (2) when a player is so seriously injured that he is unable to engage in rehabilitation.[38]

[32] The Clubs were, however, directed by the NFL to provide and finance rehabilitation for the injured players at outside facilities.

[33] *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

[34] 285 NLRB at 245.

[35] Id. at 246.

[36] Id.

[37] Id.

[38] In finding that the par. 9 benefits are accrued, we rely on the following factors in addition to those cited by the judge: (1) an in-

Continued

Although, as the judge found, these accrued benefits are subject to defeasance if the player does not cooperate in his Club's rehabilitation program,[39] if and when he is able to do so, we find that this requirement does not render the paragraph 9 benefits nonaccrued. The undisputed evidence shows that the disabled players were entitled to and, in fact, were receiving benefits under the standard contract when the strike began, and that the Respondents suspended the benefits on commencement of the strike. In agreement with the judge, we find that the Injured Reserve payments are accrued benefits, and that the Respondents withheld the accrued benefits on the basis of the strike.[40]

We further agree that the Respondents failed to meet their burden of showing a legitimate and substantial business justification for withholding the accrued benefits. The judge found, inter alia, that the Respondents withheld the accrued benefits to the 26 injured players because they failed to report to their Clubs' facilities during the strike and because they failed to declare that they were not strikers. The record establishes that the Respondents withheld the accrued benefits because the Respondents considered the 26 injured players to be strikers and therefore not entitled to the benefits. Unless the Injured Reserve players proved otherwise by crossing the picket line or disavowing their support for the strike, the Respondents viewed them as having forfeited their accrued Injured Reserve benefits. Those reasons, as the judge found, are not legitimate.[41]

jured player's right to continue receiving the benefit is protected against termination by the prohibition against terminating his contract on account of the injury, in contrast to the nonprotected status of uninjured players; (2) each of the 26 players was placed by the Respondents on either Injured Reserve or PUP status, which precluded their participation in NFL games but did not affect their rights under par. 9; and (3) the Respondents continued to provide the other benefit called for in par. 9, medical or hospital care, at the Club's expense, during the strike.

[39] Although most Clubs expect Injured Reserve players to attend club meetings and practices to the extent they are requested and able to do so, the judge found that the NFL Player Contract and the club practices demonstrate that a player's failure to engage in any function other than rehabilitation would not result in the loss of Injured Reserve benefits.

[40] Cf. *Phelps Dodge Refining Corp.*, 299 NLRB 1111 (1990). In *Phelps Dodge*, we found that the General Counsel had not established a prima facie case that the benefits in question had accrued when employees made request for them because the benefit plan required, inter alia, 10 years of continuous service, a requirement which the employees did not meet. There is no analogous requirement here.

[41] Given the basis for our holding, we find it unnecessary to address the question whether the Respondents' conduct was inherently destructive of employee rights.

In addition to the case law relied on by the judge in reaching his conclusion, we also rely on *Grocers Supply Co.*, 294 NLRB 438 (1989).

D. *Dallas Cowboys and New England Patriots*

For the reasons set forth by the judge, we affirm his finding that Respondent Dallas Cowboys violated Section 8(a)(1) of the Act by threatening employee Kevin Brooks with a forfeiture of deferred compensation because he went on strike. Brooks' NFL Player Contract provided for the forfeiture of certain deferred compensation only in the case of his ''retirement'' during the 1987 or 1988 seasons. We agree with the judge that Brooks' strike activities cannot be equated with ''retirement'' on his part. However, we find it unnecessary to pass on the judge's findings that the Cowboys also violated Section 8(a)(1) by making similar threats to employees Dorsett, Walls,[42] and Jones, as these findings are cumulative and do not affect the amended remedy.[43]

We also affirm, for the reasons set forth by the judge, his finding that the New England Patriots violated Section 8(a)(1) of the Act by the threat, contained in Sullivan's October 6 letter to Lin Dawson, to trade players involved in the strike.

E. *Alleged Sequestration Order Violation*

The judge recommended that a hearing be directed concerning Attorney Karch's alleged violation of the sequestration rule in effect during the hearing. We note that this attorney has previously been admonished by the Board for violating a sequestration order. See *Seattle Seahawks*, 292 NLRB 899, 908 (1989). Accordingly, we have ordered that a hearing be held pursuant to Section 102.44 of the Board's Rules and Regulations to determine whether Attorney Karch should be disciplined for violation of the sequestration order and, if so, what discipline should be imposed. See *Rose Printing Co.*, 146 NLRB 638 fn. 1 (1964). Under Section 102.44, such discipline may include suspension or disbarment by the Board from further practice before it.

REMEDY

To remedy the unfair labor practices which we have found, we shall order the Respondents to cease and desist, and to take certain affirmative action necessary to

[42] The General Counsel seeks attorneys fees for Walls because he contacted an attorney after being informed of the Cowboys' position on the deferred compensation issue. Even if we were to rule that the Cowboys' actions violated Sec. 8(a)(1), we would not award attorneys fees. The record, so far as it goes, does not indicate that the Cowboys' position, even if incorrect, was patently frivolous. We note also that the record does not show that Walls engaged in any litigation with the Cowboys over the issue. *Betra Mfg. Co.*, 233 NLRB 1126 (1977). Cf. *Sentry Armored Courier*, 293 NLRB 115 (1990).

[43] We have also deleted the expungement provision in the judge's recommended Order and notice. We find this provision to be unnecessary, as there is no evidence that Respondent Cowboys will rely on the disputed documents as a basis for adverse action in the future.

effectuate the purposes of the Act. Specifically, we shall order the Respondents to make whole all employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the Respondents' Wednesday eligibility rule for strikers, with interest computed in the manner set forth in the judge's decision.[44] The Respondents shall also make whole those injured players denied compensation on account of their participation in the strike in the manner set forth in the judge's decision.

ORDER

A. Respondents, National Football League Management Council (Management Council) and the 28 Constituent Member Clubs of the National Football League, The Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; The Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; The Detroit Lions, Inc., d/b/a Detroit Lions; The Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; The Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders; Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; New England Patriots Football Club, Inc., d/b/a New England Patriots; The New Orleans Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; The Philadelphia Eagles Football Club, Inc., d/b/a Philadelphia Eagles; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; The St. Louis Football Cardinals, Inc., d/b/a St. Louis Cardinals, now known as B & B Holding, Inc., d/b/a Phoenix Cardinals; The Chargers Football Company, d/b/a San Diego Chargers; The San Francisco Forty-Niners, Ltd., d/b/a San Francisco 49ers; The Seattle Professional Football Club, d/b/a Seattle Seahawks; Tampa Bay Area Football, d/b/a Tampa Bay Buccaneers; and Pro-Football, Inc., d/b/a Washington Redskins, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging employees from engaging in protected concerted activities, including participating in an economic strike, by failing and refusing to reinstate economic strikers after termination of the strike, or unduly delaying their reinstatement, to vacant positions.

(b) Establishing, promulgating, and enforcing rules which discriminate against strikers by requiring them to report for work prior to deadlines earlier than those established for nonstrikers in order to be eligible to participate in, or to be paid a game check for, any National Football League game.

(c) Discriminating against their employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike because of their union and concerted and protected activities.

(d) Discriminating against their employees on Injured Reserve or Physically Unable to Perform status by imposing requirements not in existence before the strike began and conditioning their benefit payments on satisfaction of those strike-induced requirements.

(e) Discriminating against their employees on Injured Reserve or Physically Unable to Perform status by refusing to pay them game checks unless they resign from the Union or refrain from participation in union activities.

(f) In any like or related manner interfering with, restraining, or coercing their employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make whole all employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the discriminatory reporting deadline established by the Respondents in the manner set forth in the remedy section of this decision.

(b) Make whole the following employees who were discriminatorily denied four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller, Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten (three), Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, rosters, social security payment records, timecards, personnel records and reports, player contracts, and all other records necessary to analyze

[44] Contrary to the judge, we find that employees who did not physically report to their Club prior to October 17 are also entitled to backpay. These individuals were aware that any attempt to report prior to the October 18 and 19 games would be futile once the deadline had passed. Under these circumstances, players were not required to report in order to retain their eligibility for backpay. See *Abilities & Goodwill Co.*, 241 NLRB 27 (1979), enf. denied other grounds 612 F.2d 61 (1st Cir. 1979).

the amounts of backpay due under the terms of this Order.

(d) The Management Council shall post at its place of business and at the places of business of all its constituent member Clubs copies of the attached ''Appendix A.'' The constituent member Clubs, except the Dallas Cowboys and New England Patriots, shall post at their places of business copies of the attached notice marked ''Appendix B.'' The New England Patriots and the Dallas Cowboys shall post copies of the attached notices marked ''Appendix C'' and ''Appendix D,'' respectively.[45] Copies of the notices, on forms provided by the Regional Director for Region 5, after being signed by the representatives of the Management Council and the respective Clubs, shall be posted by them immediately on receipt and be maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Management Council and the Clubs to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

B. The New England Patriots Football Club, Inc., d/b/a New England Patriots shall, in addition to the foregoing, cease and desist from threatening to trade its employees because of their union and concerted and protected activities.

C. The Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys shall, in addition to the foregoing, cease and desist from threatening its employees because of their participation in a lawful strike with forfeiture of any deferred compensation when the employee's NFL Player Contract does not provide for the forfeiture of such compensation under those circumstances.

IT IS FURTHER ORDERED that the protective order entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony be continued in full force and effect and that all exhibits introduced into evidence under seal will continue to be maintained under seal and that portions of the transcript of the hearing held during in camera sessions will not be open to the public.

IT IS FURTHER ORDERED that the Regional Director for Region 5 shall schedule a hearing, with notice to all parties, before an administrative law judge to determine (1) whether Attorney Karch violated the sequestration order, and (2) whether he should be disciplined for violation of the sequestration order and, if so, what discipline should be imposed. Under Section 102.44 of the Board's Rules and Regulations such discipline may include suspension or disbarment by the Board from further practice before it.[46] The judge shall hear and receive testimony and evidence, and prepare and serve on the parties a decision containing credibility resolutions, findings of fact, conclusions of law, and recommendations to the Board. Following service of such decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[46] The Board has decided to sever the motion to discipline from the unfair labor practices and all further reference to the motion to discipline, including a decision and recommended Order by the administration law judge should refer to this matter as: In re: Sargent Karch.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees from engaging in protected, concerted activities, including participating in an economic strike, by failing or refusing to reinstate economic strikers after termination of the strike, or unduly delaying their reinstatement, to vacant positions.

WE WILL NOT establish, promulgate, and enforce rules which discriminate against strikers by requiring them to report for work prior to deadlines earlier than those established for nonstrikers in order to be eligible to participate in, or to receive a game check for, any National Football League game.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike because of their union and concerted and protected activities.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by imposing requirements not in existence before the strike began and conditioning their benefit payments on satisfaction of those strike-induced requirements.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by refusing to pay them game checks unless they resign from the Union or refrain from participation in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make whole all employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the Wednesday reporting deadline for any loss of earnings or any other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make whole the following employees who were discriminatorily denied four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller; Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten (three), Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein, with interest.

NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees from engaging in protected, concerted activities, including participating in an economic strike, by failing or refusing to reinstate economic strikers after termionation of the strike, or unduly delaying their reinstatement, to vacant positions.

WE WILL NOT establish, promulgate, and enforce rules which discriminate against strikers by requiring them to report for work prior to deadlines earlier than those established for nonstrikers in order to be eligible to participate in, or to receive a game check for, any National Football League game.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike because of their union and concerted and protected activities.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by imposing requirements not in existence before the strike began and conditioning their benefit payments on satisfaction of those strike-induced requirements.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by refusing to pay them game checks unless they resign from the Union or refrain from participation in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make whole all our employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the Wednesday reporting deadline for any loss of earnings or any other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make whole the following employees who were discriminatorily denied four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller; Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten (three), Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein, with interest.

(NAME OF CLUB) A CONSTITUENT MEMBER OF THE NATIONAL FOOTBALL LEAGUE

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage employees from engaging in protected concerted activities, including participating in an economic strike, by failing or refusing to reinstate economic strikers after termination of the strike, or unduly delaying their reinstatement, to vacant positions.

WE WILL NOT establish, promulgate, and enforce rules which discriminate against strikers by requiring them to report for work prior to deadlines earlier than those established for nonstrikers in order to be eligible to participate in, or to receive a game check for, any National Football League game.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike be-

cause of their union and concerted and protected activities.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by imposing requirements not in existence before the strike began and conditioning their benefit payments on satisfaction of those strike-induced requirements.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by refusing to pay them game checks unless they resign from the Union or refrain from participation in union activities.

WE WILL NOT threaten to trade our employees because of their union and concerted and protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make whole all our employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the Wednesday reporting deadline for any loss of earnings or any other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make whole the following employees who were discriminatorily denied four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller; Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten (three), Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein, with interest.

NEW ENGLAND PATRIOTS FOOTBALL CLUB, INC., D/B/A NEW ENGLAND PATRIOTS

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discourage our employees from engaging in protected, concerted activities, including participating in an economic strike, by failing or refusing to reinstate economic strikers after termination of the strike, or unduly delaying their reinstatement, to vacant positions.

WE WILL NOT establish, promulgate, and enforce rules which discriminate against strikers by requiring them to report for work prior to deadlines earlier than those established for nonstrikers in order to be eligible to participate in, and to receive a game check for, any National Football League game.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by failing to pay them game checks during a strike because of their union and concerted and protected activities.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by imposing requirements not in existence before the strike began and conditioning their benefit payments on satisfaction of those strike-induced requirements.

WE WILL NOT discriminate against our employees on Injured Reserve or Physically Unable to Perform status by refusing to pay them game checks unless they resign from the Union or refrain from participation in union activities.

WE WILL NOT threaten our employees because of their participation in a lawful strike with forfeiture of any deferred compensation when the employee's NFL Player Contract does not provide for forfeiture of such compensation under those circumstances.

WE WILL NOT inform our employees that they would have to resign from the Union in order to obtain physical therapy at our facility.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL make whole all our employees who were denied wages and declared ineligible for the games played on October 18 and 19, 1987, on the basis of the Wednesday reporting deadline for any loss of earnings or any other benefits suffered as a result of the discrimination against them, with interest.

WE WILL make whole the following employees who were discriminatorily denied four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller; Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve Deline, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten (three), Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein, with interest.

THE DALLAS COWBOYS FOOTBALL CLUB, LTD., D/B/A DALLAS COWBOYS

Nelson A. Levin, Esq., Eric A. Fine, Esq., Harvey A. Holzman, Esq., and *Ronald Broun, Esq.*, for the General Counsel.

Richard Appel, Esq., Daniel L. Nash, Esq. and *F. Lal Heneghan, Esq. (Akin, Gump, Strauss, Hauer & Feld)*, of Washington, D.C., for the Respondent Management Council.

Sargent Karch, Esq., Brian S. Harvey, Esq., and *Douglas E. Lee, Esq. (Baker & Hostetler)*, of Washington, D.C., for the Respondents Constituent Member Clubs.

Robert G. Mebus, Esq. (Haynes and Boone), of Dallas, Texas, for the Respondent Dallas Cowboys.

Timothy J. English, Esq. and *Thomas Depaso, Esq*., of Washington, D.C., for the Charging Party Players Association.

DECISION

I. PRELIMINARY STATEMENT

BENJAMIN SCHLESINGER, Administrative Law Judge. At midnight, September 21, 1987,[1] the National Football League Players Association (Union) struck the 28 Clubs[2] of the National Football League (NFL or League). All games scheduled for the following weekend (including the Monday night football game) were canceled. The next two weekends, the games were played by replacement players and veteran players who had refused to strike or who had returned to their teams after striking. Before the following weekend's games, on Thursday, October 15, a substantial number of the players then on strike appeared at their respective team's facilities and offered to return. All the Clubs, relying upon a rule adopted by the National Football League Management Council (Management Council) which required the striking players to return by Wednesday, 1 p.m., New York time,[3] rejected the returning strikers' offers, because they had returned a day too late. Thus, the games that weekend were played mostly by replacement players, some of whom were hired later that week, even after the strikers had offered to return.

The complaint in Case 5–CA–19170 alleges that the rule, which permitted teams to sign players other than those on strike as late as 4 p.m. on Saturday to play in Sunday games and 4 p.m. on Monday to play in games scheduled for that night, distinguished between returning strikers and replacement players based solely on their participation or lack of participation in the Union's strike, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Management Council and the Constituent Clubs of the NFL (Clubs; both collectively referred to as Respondents)[4] denied that they violated the Act in this respect or committed any other of the many violations that are alleged.[5]

On the entire record in this proceeding,[6] including my observation of the witnesses as they testified,[7] and after due consideration of the briefs submitted by all parties, I make the following

FINDINGS OF FACT

II. JURISDICTION

The NFL, an organization with an office and principal place of business in New York, New York, has been engaged through its 28 teams in the operation of a professional football league throughout the United States. The following Clubs have been the constituent members of the NFL: The Five Smiths, Inc., d/b/a Atlanta Falcons; Buffalo Bills, Inc., d/b/a Buffalo Bills; Chicago Bears Football Club, Inc., d/b/a Chicago Bears; Cincinnati Bengals, Inc., d/b/a Cincinnati Bengals; Cleveland Browns, Inc., d/b/a Cleveland Browns; The Dallas Cowboys Football Club, Ltd., d/b/a Dallas Cowboys; PDB Sports, Ltd., d/b/a Denver Broncos; The Detroit Lions, Inc., d/b/a Detroit Lions; The Green Bay Packers, Inc., d/b/a Green Bay Packers; Houston Oilers, Inc., d/b/a Houston Oilers; Indianapolis Colts, Inc., d/b/a Indianapolis Colts; Kansas City Chiefs Football Club, Inc., d/b/a Kansas City Chiefs; The Los Angeles Raiders, Ltd., d/b/a Los Angeles Raiders; Los Angeles Rams Football Company, Inc., d/b/a Los Angeles Rams; Miami Dolphins, Ltd., d/b/a Miami Dolphins; Minnesota Vikings Football Club, Inc., d/b/a Minnesota Vikings; New England Patriots Football Club, Inc., d/b/a New England Patriots; The New Orleans Saints Limited Partnership, d/b/a New Orleans Saints; New York Football Giants, Inc., d/b/a New York Giants; New York Jets Football Club, Inc., d/b/a New York Jets; The Philadelphia

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[1] All dates refer to the year 1987, unless otherwise stated.

[2] Since the issuance of the complaint, the Cardinals moved to Phoenix, Arizona. The team is now known as B & B Holding, Inc., d/b/a Phoenix Cardinals, an Arizona corporation.

[3] Unless otherwise stated, all times are New York time.

[4] Wherever the context dictates, ''Clubs'' may refer to only some of the Constituent Clubs and ''Club'' may refer to only one of the Constituent Clubs.

[5] The relevant docket entries in this proceeding are as follows: The Union filed the unfair labor practice charge in Case 5–CA–19170 on October 15. The Union filed its charge in Case 2–CA–22449 on September 22, and the case was transferred on March 18, 1988, by the General Counsel to Region 5, where it was redesignated Case 5–CA–19508; and a complaint issued on March 25, 1988. The Union filed its charge in Case 2–CA–22476 on October 5, and the case was transferred on February 9, 1988, by the General Counsel to Region 5, where it was redesignated Case 5–CA–19415; and a complaint issued on March 11, 1988. These three cases were consolidated for hearing on March 25, 1988, and the hearing commenced in Washington, D.C. on May 9, 1988. During the hearing, the complaint was amended on many occasions, particularly to add new alleged supervisors and agents. However, a new complaint, dated June 29, 1988, issued during the course of the hearing, and that complaint in Cases 5–CA–19559 and 5–CA–19773 was consolidated in this proceeding on August 9, 1988. The Union filed the charge in Case 5–CA–19559 on April 1, 1988. Steve Fuller filed his charge in Case 13–CA–27607 on March 16, 1988, and the case was transferred on June 28, 1988, by the General Counsel to Region 5, where it was redesignated Case 5–CA–19773. The hearing in this proceeding continued in Washington, D.C., for more than 95 days and closed by order dated August 15, 1989.

[6] The General Counsel submitted a stipulation agreed to by all parties amending the official transcript in numerous respects. The transcript is amended accordingly.

[7] To the extent that there is testimony which conflicts with my findings, I credit the witnesses whose testimony I rely on. In making these credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony in contradiction to that upon which my factual findings are based has been carefully considered but discredited. Where necessary, however, I have set forth the precise reasons for my credibility resolutions. See generally *NLRB v. Walton Mfg. Co*., 369 U.S. 404, 408 (1962).

Eagles Football Club, Inc., d/b/a Philadelphia Eagles; Pittsburgh Steelers Sports, Inc., d/b/a Pittsburgh Steelers; The St. Louis Football Cardinals, Inc., d/b/a St. Louis Cardinals, now known as B & B Holding, Inc., d/b/a Phoenix Cardinals; The Chargers Football Company, d/b/a San Diego Chargers; The San Francisco Forty-Niners, Ltd., d/b/a San Francisco 49ers; The Seattle Professional Football Club, d/b/a Seattle Seahawks; Tampa Bay Area Football, d/b/a Tampa Bay Buccaneers; and Pro-Football, Inc., d/b/a Washington Redskins. In the year preceding December 11, a representative period, each of the Clubs received total revenues in excess of $500,000 and purchased and received in interstate commerce goods and materials in excess of $50,000 from points outside the State in which each Club is located.

The Management Council is an unincorporated association with its principal office in New York, New York. All the Clubs are eligible for membership in and each has become a member of the Management Council by agreeing to abide by its articles of association and bylaws and has designated a representative to act for it in the affairs of the Management Council.

The Management Council's purpose ''is to act on a nonprofit basis as the representative of the Members of the [Management] Council in the conduct of collective bargaining and other player relations of mutual interest to all Members.'' As the Clubs' bargaining representative, the Management Council formulates and administers common labor relations policies regarding the players on behalf of the Clubs; it negotiates the collective-bargaining agreement with the Union; it advises and counsels the Clubs on contracts with individual players; it handles all grievances and arbitrations; it maintains statistical services to advise the Clubs in their negotiations with the players; and it advises the Clubs about various benefits, such as workmen's compensation.

The major decision-making powers for the Management Council are vested in the Council Executive Committee (''CEC''), which is a group of no more than six persons, elected by and from all of the Clubs' representatives.[8] With very few exceptions,[9] the CEC has total authority to act on behalf of the Management Council; and all the Clubs are bound by the CEC's actions and may be penalized if they fail to abide by them.

I conclude that the Management Council and each of the Clubs are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, as the Board has previously found in *National Football League Management Council*, 203 NLRB 958 (1973), denied in part 503 F.2d 12 (8th Cir. 1974), modified on remand 216 NLRB 423 (1975). To the extent that new Clubs have joined the NFL since that decision, or that Clubs have changed their names or locations, they are also employers within the meaning of the Act. Furthermore, in the above-cited decision, at page 961, the Board found that the 26 Clubs constituted a single employer for bargaining purposes by virtue of their membership in the Management Council. By the same logic, I conclude that, because all 28 Clubs are members of the Management Council, all 28 Clubs constitute a single employer for bargaining purposes.

Separate unfair labor practices have been alleged against the Dallas Cowboys, which is a Texas limited partnership with an office and place of business in Dallas, Texas, and the New England Patriots, which is a corporation with an office and place of business in Foxboro, Massachusetts.

On or about January 22, 1971, the Union was certified as the exclusive collective-bargaining representative of the active players and certain others who were injured. I conclude, as Respondents admit, that at all relevant and material times the Union was a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Return from the Strike*

Collective bargaining between the Management Council and the Union cannot be considered the prime example of successful labor relations. Since the Union was first certified in 1971, not one series of bargaining negotiations ended without a players' strike. One of the issues which has plagued the parties has been the Union's demand, bitterly opposed by the Management Council, for free agency, that each player should be free to negotiate with any team he wanted, instead of being bound to one team by reason of provisions that the Union deemed would inhibit other teams from ever signing that player. In addition to this issue being repeatedly raised in negotiations or, at least, being an underlying source of conflict, the Union has participated in various legal actions, with the ultimate aim of permitting the players the opportunity to negotiate with any team of their choice.[10]

In December 1986 the Union distributed its negotiating plan for a new agreement in 1987, the then present one expiring on August 31, 1987. Its prime aim was free agency, and it expressed without reservation that, if free agency was not agreed to at the bargaining table, it would be attained with a strike. Whether this threat, repeated frequently in the document, shocked Jack Donlan, the executive director of the Management Council, is probably inconsequential, but there had been some thought in the past that the NFL would not suffer a repetition of the 57-day strike in 1982. There were no games played then, and thus no spectators and no sales of hot dogs, programs, and souvenirs, and no fees for parking. Of even more importance, fan interest, both spectators and television viewers, waned for a number of years thereafter, further reducing the income of the Clubs. As early as February 1987, at a meeting of the CEC, and March, at a meeting of the competition committee of the NFL, there was a general consensus that, if there were to be a strike, the League would continue to play its full schedule in 1987 with

[8] The members of the CEC during the pertinent times herein were Chairman Hugh Culverhouse, Buccaneers; Mike Brown, Bengals; Joe Robbie, Dolphins; Dan Rooney, Steelers; Tex Schramm, Cowboys; and Chuck Sullivan, Patriots. Contrary to the contentions of the Management Council, there is no evidence that Sullivan resigned his membership from the CEC during the time when the issues herein arose. A press release issued by the Management Council on October 15, the day of the players' return, stated that he was then a member.

[9] The Management Council's members must approve the collective-bargaining agreement or any changes to it, the annual budget, and any extraordinary or nonrecurring expenditure of more than $50,000 for any item not included in the budget.

[10] For example, *Powell v. National Football League*, 888 F.2d 559 (8th Cir. 1989), cert. denied 111 S.Ct. 711 (Jan. 7, 1991).

those players who refused to strike and with replacements hired to play during the strike.

The 1987 negotiations started early, but there was little progress. Donlan and union executive director and principal negotiator, Gene Upshaw, appeared to be good friends. Whether they spoke the same language and understood one another fully is quite a different matter. One dispute became apparent: Skipping all of the many proposals made by the Union, the one overriding issue was free agency. The Union wanted it, at least facially, although the testimony of Richard Berthelsen, the Union's general counsel, suggests that the Union would have settled for something less than full free agency. The Management Council opposed it strenuously, although it probably would have bent somewhat, but far too little for the Union to ever accept anything that the Management Council might have offered.

As summer approached, with training camps opening in July, the parties continued to be stalemated. Because of their fundamental disagreement over the free agency issue, both Donlan and Upshaw must have realized that they could not reach an agreement as long as neither changed his position. So there was talk of other issues, such as pension and welfare benefits, per diem meal payments, and the like, and much posturing, simply because the parties had run out of new ideas. While the negotiations inched along, Upshaw made his plans for the strike, traveling extensively from training camp to training camp throughout the country to ensure his members' support for the Union's goals. Finally, Upshaw announced on September 8 that the Union would strike at midnight on Monday, September 21, the time when the Monday night, television-broadcast game should have ended.

Earlier, the Management Council made tentative plans for a replacement season in the event of a strike. In April it advised the Clubs to sign option agreements with players cut during the training camps. They would comprise the core of the replacement teams in the event that there was a strike. In late 1986 Donlan had selected Edward LeBaron, a former football star and executive of the Falcons and presently an attorney, as a consultant to the Management Council for the then upcoming negotiations. On August 25, 1987, the CEC decided definitely to continue the League schedule, and Donlan asked LeBaron to act as coordinator to help in running the replacement season. Following the CEC meeting, new option agreements were sent to the Clubs, who had paid little attention to those agreements when they were sent in April.

With the start of the strike on September 21, LeBaron and the Management Council staff contacted the Clubs to find out how their hiring of new players was progressing. Many Clubs had exercised option agreements and hired other replacement players. Other Clubs had not followed the Management Council's advice. They either had expected or had lulled themselves into the false hope that there would not be a strike, and they were slow to hire new players and had not hired enough players to complete their rosters. Others had hired a sufficient number of players, but not players to fill all the positions. LeBaron urged them to hire enough players to field competitive teams. But some players were reporting on Wednesday, September 23, and even more on Thursday, and there was no time to prepare game plans for the games that weekend, no less to try out new players and to conduct practices. By Thursday the Management Council effected a previously adopted position and announced that it had canceled the weekend's games. There was a promise, however, that the League would resume the following weekend, strike or no strike.

LeBaron continued to press the Clubs to hire sufficient personnel to play in the upcoming first replacement game. Until that condition was satisfied, his instructions to the Clubs were to hire players with abandon, try them out, and experiment. The collective-bargaining agreement's provision limiting Clubs to a roster of 45 active players was effectively eliminated. In these early days of the strike, a new football season had begun. Coaches were starting training camps all over again, trying to teach the fundamentals of professional football to players who had not made the regular season teams, many with little experience, even less than those who had attended training camps in July and August, and many who had been away from the professional game for months or years.

On September 29, the Management Council adopted new rules for the upcoming games. There would continue to be no roster limits on the number of players until the day before the first replacement games, Saturday, October 3, at 4 p.m., when the Clubs would be limited to 45 active players who could play in Sunday's and Monday's games. However, the Clubs could retain an unlimited number of inactive players. By the following Tuesday, October 6, when the Clubs knew better who could play well and who could not, the roster limit would be reduced to 55 players, of whom 45 would be active and 10 inactive. The Clubs could adjust their rosters until 4 p.m. on Saturday for those playing on Sunday and until 4 p.m. on Monday for those playing that night. Other rules in effect during the regular season were modified to create a larger pool from which players would be available to the Clubs.

The CEC adopted special eligibility rules. Striking players who wished to return to play had to report by 12 noon, local time, on Friday in order to be eligible to play on Sunday or Monday. The Clubs were also forbidden from signing nonstriking players after Friday noon. On Friday, October 2, LeBaron amended these rules with the approval of the CEC after at least one team on the East Coast complained that returning strikers had to return by 12 noon, New York time, but teams on the West Coast had 3 extra hours to hire returning strikers, because of the difference between the time zones. To resolve this complaint, the Clubs could permit the strikers to return and could sign nonstriking players by 3 p.m., New York time.

The CEC modified the rules on October 5, and these modified rules were in effect not only for that weekend's games (October 11 and 12) but also for the following weekend's games, which are at issue in this proceeding. First, the time that a striking player had to return was moved forward from Friday to Wednesday at 1 p.m. A striking player who returned after the Wednesday deadline would not be able to play in that weekend's games, both Sunday and Monday. However, the deadlines for signing nonstriking players were moved back to Saturday at 4 p.m. for teams playing on Sunday and 4 p.m. on Monday for teams playing that night. These deadlines for nonstrikers were the same deadlines that the NFL had used for the signing of any player during the regular seasons prior to and after the strike. Only during the

1987 strike was there a different, earlier deadline rule, and that earlier deadline applied only to the strikers, and not to nonstrikers.

When several Clubs reported that they had heard rumors that strikers could return even past the deadline, the Management Council issued the following memorandum to the Clubs on October 7:

> A number of clubs have called to inquire whether the Wednesday p.m. EDT deadline for players to return to be eligible for the Sunday and Monday games is firm.
>
> The deadline is firm. Many clubs have expressed concerns that if striking players are permitted to return any closer to game time, the coaching staffs would have insufficient time to prepare players for the games.
>
> Also, the longer the strike progresses, the more conditioning problems arise with respect to returning players. In order for all clubs to be in an equal competitive position, the deadline must be and will be observed.

The next week, on October 13, the CEC reconsidered whether the rule might be waived and reiterated its prior advice. So, when most of the striking players on each of the teams returned on Thursday, October 15—the Redskins returned the earliest, at about 9 a.m.[11]—and offered to practice and to play in the games scheduled for Sunday and Monday, October 18 and 19, all the Clubs relied on the Management Council's rule (many of them reluctantly) and rejected the offer.[12] Most returning strikers were permitted only to commence practice, for which the Clubs would pay them the per diem pay that the players earned in training camp, $50 per day. They would not pay the players their regular game pay, which averaged $15,000 (one-sixteenth of their salaries); nor would the Clubs permit them to play that weekend. However, that day and the following Friday and Saturday, 15 nonstriking players were hired by the Clubs to play in that weekend's games. They played the same positions that certain striking employees had offered to play, but were told by the Clubs that they could not because of the Wednesday deadline rule.

Upshaw wrote Donlan on Thursday afternoon that the player representatives had voted that day to send the players back to work and asked Donlan to confirm that the players would be allowed to resume their normal work activities as soon as they reported and to play in the upcoming games with full pay. The Management Council contends that this was not an unconditional request for reinstatement and so the strike did not end, because the players conditioned their return upon being played and paid. I find its position overly technical, and the right to reinstatement does not depend upon technicalities. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967). Upshaw's letter was no more than an offer to return to work, similar to an offer in any other industry. When employees want reinstatement, it is implicit that they wish to return to their former positions, work in those positions, and be paid. *Hartmann Luggage Co.*, 183 NLRB 1246 (1970), enfd. in part 453 F.2d 178 (6th Cir. 1978). The Union's letter did not necessarily require that the coaches give up their right to coach and to decide whether to play the returning strikers. It did not require that each player actually appear in the game. Rather, it was the end of the strike, as the Management Council recognized in its public relations announcement issued that day: ''We are pleased that the National Football League's players decided today to return to their clubs and end the strike.'' Donlan affirmed in a letter he wrote to Upshaw his understanding that the Union ended its strike on that Thursday.

1. Discussion

Section 7 of the Act provides that employees have the right to engage in protected and concerted activities, and Section 8(a)(1) protects from employer interference the rights of employees to engage in protected and concerted activities. A strike is such an activity, *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963), and Section 8(a)(3) makes it unlawful for an employer to discriminate against employees to discourage their membership in a labor organization, which includes participation in concerted activities, such as a legitimate strike. Ibid.

The deadline rule excluding only the striking players from returning after 1 p.m. on Wednesday discriminates against them only because they struck. It treats them differently from the entire universe of nonstriking players. If a striking All-Star quarterback wanted to return to his team on the Thursday before the third replacement game, the team was barred from letting him play or be paid. Yet, in that team's search for a quarterback, it could hire up to the deadline set for nonstrikers anyone other than the almost 1100 strikers, athletes (or nonathletes), the overwhelming majority of whom were far less competent than the strikers and would not otherwise have been hired to play in the NFL.

Some of those who continued their strike 1 extra day and then offered to return to work were denied the chance to work in positions which the Clubs, that day or within a day or two, filled with nonstrikers. Thus, because the strikers merely exercised a right afforded them by the Act, they were denied the right to work in positions which they could have filled. The harm inflicted upon them is obvious. Under the rationale of *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32 (1967), the Clubs' failure to hire those returning strikers ''was discrimination in its simplest form.'' As the Court said, at page 32:

> [T]here can be no doubt that the discrimination was capable of discouraging membership in a labor organization within the meaning of the statute. Discouraging membership in a labor organization ''includes discouraging participation in concerted activities . . . such as a legitimate strike.'' *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963).

As to those who offered to return but were denied employment and whose positions were not subsequently filled by new hires, the effect of the discrimination is no less patent. By denying them employment, the Clubs dictated when the

[11] Most of the players on 24 of the 28 teams returned between 9 a.m. and 1:30 p.m. Three teams returned between 2 and 3 p.m. Only the Buccaneers did not report on Thursday; they reported at 8 a.m. the next morning.

[12] The Management Council contends that some returning strikers said that they would not have played with the replacement players. In the absence of any Club's acceptance of the players' offer to return to full-playing status, the strikers' views were irrelevant and speculative.

players could strike and when they could not. According to the deadline rule, the players' strike was protected so long as they returned by 1 p.m. on Wednesday, but the strikers forfeited their jobs for a week if they continued to engage in their protected activities after 1 p.m. The Act does not permit the Clubs or the Management Council to replace the judgment of the Congress and dictate when protected and concerted activities may be exercised and when those activities lose their protection. I conclude that the rule illegally discriminated against the strikers.

The issue remaining is whether the Clubs' reliance on the rule in denying reinstatement to the strikers violated the Act. Usually, in order to find a violation of the Act, the General Counsel must show that a respondent was motivated by an illegal purpose. However, proof of an illegal motive is sometimes inherent in the respondent's actions; but even in that instance, a respondent may avoid liability. In *Great Dane*, the Supreme Court wrote, at 33-34:

> [P]roof of an antiunion motivation may make unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so ''inherently destructive of employee interests'' that it may be deemed proscribed without need for proof of an underlying improper motive. That is, some conduct carries with it ''unavoidable consequences which the employer not only foresaw but which he must have intended'' and thus bears ''its own indicia of intent.'' If the conduct in question falls within this ''inherently destructive'' category, the employer has the burden of explaining away, justifying or characterizing ''his actions as something different than they appear on their face,'' and if he fails, ''an unfair labor practice charge is made out.'' And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. On the other hand, when ''the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employers' conduct is *prima facie* lawful,'' and an affirmative showing of improper motivation must be made.
>
> From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can be reasonably be concluded that the employer's discriminatory conduct was ''inherently destructive'' of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is ''comparatively slight,'' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

The Management Council litigated extensively its many contentions that the deadline rule was reasonable and justified. It showed that, under past practice, the Clubs never used the deadline rule for signing entire teams at the last moment, on a Saturday or Monday. No Club would have had time to prepare and teach a game plan within 21 hours (from 4 p.m. on Saturday to 1 p.m. on Sunday) or 5 hours (from 4 p.m. on Monday to 9 p.m. that night). Rather, teams would sign players later than Wednesday because a veteran player was injured during practice sessions or an injured player failed to recover as soon as expected for the upcoming game or, alternatively, an injured player recovered earlier than expected and thus could be activated to play at the very last moment. In most of these instances, the players who were signed late in the week were also adequately prepared to play at least minimally in the game, having practiced with the team that week and attended team meetings and film sessions. So sparingly was the late-signing rule used that each Club's average hiring after Wednesday in all of 1986 was only two players. (During the strike, the rule was used more extensively. The Clubs hired 181 players on Wednesday or later, including 82 from Thursday.)

The Management Council also elicited proof that the deadline rule would solve some of the special difficulties created by the strike: Players might return from the strike, either individually or en masse. The longer a player remained on strike, the less strength and agility he would have. He would lose his football readiness and be more susceptible to injury.[13] If a player was injured after a lengthy layoff, particularly a star, also known as an ''impact'' or ''franchise,'' player, the Clubs' huge monetary investment in that player would be lost. It would be chaotic to insist on a wholesale substitution of strikers for replacement players, who were more ready to play that weekend and who were more capable of playing a competitive game than the regulars would have played, had they been permitted to play. Furthermore, it would be unfair for a mass of veterans to return at the last moment, because the opposing coaches, who had been preparing to face a particular group of players, would not have adequate time to prepare their players to play a different group of players. A rule permitting players to return by midday on Wednesday, when the weekly practice begins in earnest with contact drills that afternoon, might not be ideal—some coaches and general managers said that they would have preferred that the players return earlier—but at least the rule permitted the players to be trained enough for the weekend that they would have been competitive and avoided injury.

I have merely touched on some of the Management Council's contentions, most of which are highly subjective judg-

[13] This is not to say that the strikers became ''couch potatoes'' as a result of the strike. Many players were addicted to exercise and keeping their bodies fit. The strikers also held informal practices during the strike, although they did not have the intensity that NFL teams' practices had, nor were they as well-motivated, nor were they supervised by the regular coaches. In addition, although attendance at those practices was moderately good at the beginning of the strike, later the players' enthusiasm waned and attendance decreased.

ments which are difficult to overcome. The General Counsel tried, introducing thousands of pages of documents and cross-examining the Management Council's representatives for days, in an attempt to show that they were simply wrong and that they were motivated solely by dislike for the Union and its free agency demands.[14] The most, however, that might be said of the General Counsel's case is that some of the Management Council's judgments might be arguable and that perhaps the Management Council could have written a different rule that might have completely avoided the controversy which caused the instant dispute. But I have the impression that many of the legal arguments were better left to the Monday morning quarterbacks, who could have argued about the relative merits of the deadline rule in the same way that they might argue about whether a coach on fourth and short yardage should have gone for a first down or punted or whether a team should keep or trade a quarterback. In short, if I were considering solely whether the rule was legitimate and substantial—and the Board has said that I need to find that the rule was no more than nonfrivolous[15]—I have little doubt that I would have found that the Management Council had the better of this case and dismissed much of this allegation.[16]

I cannot do so. What compels a contrary conclusion is that, despite the Management Council's thorough presentation of its claim that there was justification for its rule, it never proved that the CEC adopted the rule for these reasons. It was the CEC, not LeBaron or Donlan or coaches or even most of the Clubs' owners, which had full authority over games played during the strike. The CEC possessed emergency powers which included, but were not limited to, ''the opening, non-opening, closing or re-opening of any training camp, and the cancellation of any pre-season or regular season game or games.'' It was the CEC which canceled the regular season games originally scheduled for September 27 and 28. It directed that the replacement players, but not the regular players who crossed the picket line, would not be paid for the canceled games. It established when replacement players could be hired and the deadline rules dictating when strikers could return from their strike.

Yet despite the CEC's obvious involvement in the decision to adopt the rule and, later, to enforce it, the Management Council's brief is almost oblivious to that fact. The premise of the brief appears to be that LeBaron made up this rule as merely a player personnel policy and put it into effect solely with Donlan's approval and based on the recommendations of coaches and general managers, with some help from NFL staff members. But the evidence makes clear that LeBaron was not making the critical decisions; the CEC was, as the Management Council's brief almost casually and without comment agrees (''[T]he CEC approved LeBaron's recommendation and moved the reporting deadline . . . .'') Donlan and LeBaron affirmed that they were in constant contact with the CEC. Even if they had not and had instead testified that they were in charge of these decisions, I would not believe them. Donlan was merely an employee of the owners and LeBaron was his consultant, not a czar of the Management Council's labor relations.[17] The Clubs were run by the owners, not the Management Council's employees. The owners' representatives in turn elected the CEC and vested the CEC with the powers to act on their behalf.

In other words, what should have been of prime interest and attention under *Great Dane* is the reason that the CEC proceeded as it did. However, no member of the CEC testified about why it adopted the deadline rule; and, when the General Counsel sought the notes or minutes of the CEC's meetings to disprove that it was legally motivated by justifiable reasons or to show that it intended to discriminate against the players for participating in the strike, the Management Council refused to produce them, insisting that the notes were protected by, among other things, an attorney-client privilege. In furtherance of this claim, when the General Counsel asked various witnesses what happened at the CEC meetings, the Management Council's attorney directed them to make their own assessments of what should be protected by the attorney-client privilege, and I felt that I was never being told the full facts.[18] In sum, the Management Council never produced the documents to show the CEC's motivation and muzzled its witnesses in such a way that proof of its motivation was never candidly or credibly revealed.

Motivation is the crux of the Management Council's defense. *Great Dane* requires proof from the CEC of its true motivation, and all that is arguably present here is the memorandum from the Management Council of October 7, quoted above at page 9, that the rule would not be waived because of insufficient time to prepare the returning players and their lack of conditioning, and an interview of CEC member Joe Robbie on ABC's Nightline held after the players had been refused reinstatement. What was contained in the memorandum and spoken about in the interview could have been the valid justifications that would have prompted me to dismiss

[14] I reject the General Counsel's argument that the history of bargaining shows animus. There is no complaint that the Management Council bargained in bad faith. Whatever dislike was evidenced for the Union's demand for free agency was merely an honest disagreement over whether the proposal was justified and beneficial. Blaming the Union for pursuing an issue unacceptable to management or causing the strike is a natural component of hard bargaining, not an unfair labor practice or evidence of animus.

[15] *Harter Equipment*, 280 NLRB 597, 600 fn. 9 (1986).

[16] Because the Management Council's purported reasons for the rule do not apply to injured players, as found in sec. III,C,1, below and, I find, would not have applied to specialists, such as punters and place kickers, who, if they had remained in good physical condition during the strike, would have been able to play with little preparation, I would not have found that the Clubs had any legitimate justification to reject their offers of reinstatement. Nor would I have found the rule to be justified under any circumstance in permitting any of the Clubs to hire new players to play in positions which returning strikers had offered to play prior to the signing of the nonstrikers.

[17] As the Management Council's brief states:

> General Counsel's unsupported allegation that the Management Council ''claims it charged Lebaron [sic], a non labor attorney, with total control of it [sic] labor relations during the strike'' is simply a misrepresentation of the record evidence.

[18] I am not holding that the exercise of a privilege automatically requires a trier of fact to become skeptical of a witness' credibility. In the ordinary case, I would not question that exercise. Here, however, as will be seen below, I overruled the Management Council's objections to the notes and found that the person who wrote the notes did not accurately testify that he was acting as an attorney when he wrote the notes. I cannot avoid the thought that he may have made the same errors when he decided what he should reveal in his testimony.

this allegation, but no member of the CEC testified that these were the CEC's reasons.

It was not until the next to the last day of the hearing that a member of the CEC testified. When Tex Schramm did, he was asked by the Management Council's attorney only to explain certain statements, quoted below at page 27, that he made in an October 14 television interview. Not once did Schramm mention the reasons he and his colleagues on the CEC expressed when the CEC adopted the rule, changed it, or decided to enforce it.[19] On cross-examination, both counsel for the General Counsel and the Union attempted to pry into those reasons; but the Management Council's counsel objected to the very inquiry about motivation that the Management Council was obliged to prove.[20] The objections were based upon the fact that Schramm was never asked in his direct testimony about any meeting of the CEC, a legally correct position. As a result, the record lacks any reliable evidence from the members of the CEC who adopted the rule and who discussed the possibility of waiving the rule, about their motivation. Without that evidence, the Management Council's purported justifications are reduced to pretexts, those reasons which might have been valid if only they had been relied upon, ''thus leaving intact the inference of wrongful motive established by the General Counsel.'' *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

Furthermore, when the General Counsel sought to question the CEC's motivation by subpoenaing the minutes of or notes taken at the relevant meetings of the CEC, the Management Council refused to produce them. James Conway, the Management Council's general counsel and assistant executive director, testified about the CEC's three meetings (September 29 and October 5 and 13) at which the rule was discussed. He stated that he made notes at those meetings and that portions of his notes of each meeting pertained to the rule.[21] The Management Council moved to quash the subpoena on the grounds that Conway's notes were protected by the attorney-client privilege and constituted attorneys' work product and that they represented the Management Council's strategy for collective bargaining, relying on *Patrick Cudahy, Inc.*, 288 NLRB 968 (1988).

I denied, with a few exceptions, the Management Council's motion to quash. After reviewing Conway's testimony, given in open hearing and in camera, and reading the notes, which were produced for my in camera inspection, I concluded that Conway performed both legal and nonlegal work. Sometimes, his functions were so intertwined that even he had difficulty in asserting whether his notes reflected matters about which he was consulted because he was an attorney or matters which were generally talked about at the meetings, as to which Conway, in light of his general knowledge of the industry and as Donlan's assistant, was to interject his advice when he thought it to be appropriate.

I found that the CEC's meetings were not called for the purpose of consulting with Conway as an attorney, giving him certain facts in confidence for him to give his advice. Rather, the meetings, which were regularly scheduled for each Monday or Tuesday, were held as part of the CEC's day-to-day planning and strategy during the strike, attended by not only members of the CEC, but also Donlan and Conway and sometimes LeBaron, Sargent Karch, an outside counsel to the Management Council and previously its executive director (and the Clubs' attorney in this proceeding), and Art Modell, a team owner and chairman of the NFL's competition committee. Conway's notes primarily reflected discussions of purely business matters, which were not directed to Conway, certainly not as an attorney, and in which Conway did not directly participate, except to listen. I did not credit Conway's contention that much of what he wrote were his mental impressions. Rather, his notes reflected actual discussions which he recorded not because he believed them to be in connection with imminent, future legal proceedings or his responsibilities as a lawyer, but because he wanted to understand the business decisions made so that he could implement them as part of his administrative functions as Donlan's assistant. Finally, I found that the notes did not concern themselves with future collective-bargaining strategy.

The Management Council applied to the Board to appeal specially from my denial of its motion. The Board denied the motion on February 28, 1989.[22] Thereafter, the General Counsel demanded that the Management Council produce the notes, and it refused to do so. The General Counsel then moved at the hearing and now renews in his brief that adverse inferences be drawn from the Management Council's failure to produce the notes.

The adverse inference rule states that, when a party has relevant evidence within his control which he fails to

[19] He explained that he was not ready to waive the rule and gave reasons for his personal position. He also explained that ''we'' had made the decision that the rule was not going to be waived.

[20] The Management Council's counsel even objected, as beyond the scope of the direct examination, to the inquiry of whether the CEC by its actions during the last week of the strike intended to discourage the players from striking in the future after the expiration of another collective-bargaining agreement. On the other hand, LeBaron, when asked by the Management Council's counsel, testified that the CEC never said that penalizing the strikers was a factor in adopting the reporting deadline and that, in recommending the adoption of the rule, he was never motivated by any intention to penalize the striking players or undermine the Union's authority. Similarly, Donlan denied that adherence to the Wednesday deadline was influenced by any desire to undermine the Union or to penalize the striking players. LeBaron's and Donlan's motivation do not count. The CEC adopted the rule, not them.

[21] Donlan, LeBaron, and Conway generally agreed that variations of the deadline rule had been adopted by the CEC at the first two meetings. At the second meeting, according to LeBaron, the CEC discussed whether the rule would be waived or strictly applied if the strikers returned after the deadline. Donlan testified that the deadline rule was discussed at the third meeting and was merely reinforced, because it was working well. Because that third meeting consisted of a lengthy discussion about the Union's back-to-work proposal and the preparation of the Management Council's counterproposal and press statement, all of which pertained to the players' return to work, it is probable that lengthy consideration was given to whether the rule would be honored to the letter. The Management Council issued a special memorandum about the deadline on October 14, stating that the Union was telling player representatives that the Wednesday deadline would be deferred and that the ''CEC reviewed this issue yesterday'' and decided that the deadline was firm and would not be ''rolled'' to a later date or time.

[22] After the Board denied the Management Council's application, LeBaron testified that there was no discussion of the legalities of the deadline rule at the September 29 CEC meeting. Thus, even LeBaron, an attorney, disagreed with Conway's characterizations of the discussions of the CEC.

produce, that failure gives rise to an inference that the evidence is unfavorable to him. An inference may even be warranted that the material which the party refuses to show supports exactly the opposite of what he contends at the hearing. As Professor Wigmore has said:

> The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance or document or witness, if brought, would have exposed facts unfavorable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also always open to explanation by circumstances which make some other hypothesis a more natural one than the party's fear of exposure. But the propriety of such inference in general is not doubted. [2 Wigmore, *Evidence* § 285 (Chadbourn rev. 1979).]

One of the adverse inferences the General Counsel requests is that the Wednesday reporting rule was established for a purpose unlawful under the Act. To make that inference would be tantamount, argues the Management Council, to deciding this unfair labor practice allegation solely on the basis of its refusal to produce the notes, and that approach was rejected in *Rockingham Machine-Lunex v. NLRB*, 665 F.2d 303 (8th Cir. 1981), cert. denied 457 U.S. 1107 (1982), where the employer argued that the General Counsel's failure to call a crucial witness required the Board to find against the union. The court wrote, at 305:

> We do not believe that the [adverse inference] rule reaches that far. The rule permits an adverse inference to be drawn; it does not create a conclusive presumption against the party . . . .

The Management Council also relies on 2 Wigmore, *Evidence* § 290 at 217 (Chadbourn rev. 1979), to the effect that the adverse inference does not affect indefinitely the merits of the whole cause but affects specifically and only the evidence in question.

One cannot seriously argue with *Rockingham*, which factually is utterly distinguishable from the facts in this proceeding. There, the General Counsel was attempting to prove that the employer was bargaining in bad faith. He did so by calling the employer's chief negotiator as an adverse witness. The employer objected to the General Counsel's failure to call the union negotiator as a witness to the negotiations and contended that an adverse inference should be drawn, thus rebutting all the admissions against interest gained from the employer's negotiator. The court justifiably concluded that the contention had no merit. The adverse inference did not result in such a farfetched notion, requiring every witness on every conceivable issue to be called. Indeed, all that the union negotiator could arguably testify to was corroborative of the employer's admissions. Because those facts were already in evidence, the General Counsel was justified in not calling an additional witness.

Rockingham, therefore, merely holds that the adverse inference should be made when it makes sense to do so, and Professor Wigmore states a conclusion that should be subject to little argument, that the adverse inference should be applied only to the specific evidence in question. That specific evidence here affects directly the Management Council's asserted defense under Great Dane that the rule was motivated by valid business justifications, testified to principally by LeBaron and Donlan, and, to a slightly lesser extent, coaches and general managers. Because LeBaron and Donlan testified that they recommended the rule, and its changes and enforcement, to the CEC, which by implication followed their advice, the notes should have supported their testimony.

The General Counsel, on the other hand, wanted the notes to refute the conclusion that the CEC was motivated by justifiable reasons and to show, most favorably to the General Counsel, that the rule was adopted and enforced for a discriminatory reason. Under either circumstance, the notes are relevant to this proceeding, *Auto Workers v. NLRB*, 459 F.2d 1329, 1342 (D.C. Cir. 1972); and the Management Council's refusal to comply with the General Counsel's subpoena makes it only natural to infer that the notes are harmful to its claim.[23] Cf. *Champ Corp.*, 291 NLRB 803 (1988), enfd. 913 F.2d 639 (9th Cir. 1990). The *Auto Workers* decision is instructive:

> The reason why existence of a subpoena strengthens the force of the inference should be obvious. If a party insists on withholding evidence even in the face of a subpoena requiring its production, it can hardly be doubted he has some good reason for his insistence on suppression. Human experience indicates that the most likely reason for this insistence is that the evidence will be unfavorable to the cause of the suppressing party. [Id. at 1338.]

The Management Council relies on *NLRB v. International Medication Systems*, 640 F.2d 1110, 1116 (9th Cir. 1981), cert. denied 455 U.S. 1017 (1982), as authority for the principle that I may make no adverse inference. There, the employer refused to produce subpoenaed personnel records. The General Counsel then showed through secondary evidence that layoffs normally occurred en masse and that one employee, whose union activities had begun just the day before, was the only employee laid off. The second employee took (allegedly) one extra day of a leave of absence and was immediately terminated, whereas the General Counsel showed that other employees took unexcused leaves of absence and were not disciplined. Because of the employer's failure to comply with the subpoena, the administrative law judge prohibited the employer from rebutting the General Counsel's case on these indicia of disparity, either by cross-examining witnesses or by presenting its own witnesses.

The court held that the Board exceeded its powers, because only the district court had powers to ''impose discovery sanctions.'' Whether that rule is equally applicable to the facts in this proceeding is debatable, because the court noted that its ruling did ''not involve the 'best evidence' rule. The precluded evidence would not merely prove the contents of documents but prove facts independent of the documents.'' Id. at 1115 fn. 3. Here, I entered no preclusion order, and

[23] Although I have read them, I have made the inferences which I would have made had I not read them, and without any consideration of whether the notes actually sustain the inferences which I have made.

the evidence withheld was contained in and not independent of the subpoenaed documents. Thus, *International Medication* is distinguishable.[24]

Even if *International Medication* may be read to support the proposition that, when a subpoena issues, adverse inferences may not be made, it is contrary to Board law, *Lemay Caring Center*, 280 NLRB 60 fn. 2 (1986); *Today's Man*, 263 NLRB 332 (1982); and to three other circuits. *Hedison Mfg. Co.*, 643 F.2d 32, 34 (1st Cir. 1981); *NLRB v. C. H. Sprague & Son Co.*, 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Arts Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). The District of Columbia Circuit refused to follow *International Medication* in *Atlantic Richfield Co. v. Department of Energy*, 769 F.2d 771 (D.C. Cir. 1984), a case which involved the preclusion of affirmative defenses as a sanction for disobedience of a departmental discovery order. The court held that the broad congressional authority given to administrative agencies ''necessarily carries with it power to authorize an agency to take such procedural actions as may be necessary to maintain the integrity of the agency's adjudicatory proceedings.'' Id. at 794. The court stated, at 795:

> [W]e have increasingly entrusted agencies with decisionmaking affecting many rights and privileges hardly less important than those at stake in discovery rulings. It seems to us incongruous to grant an agency authority to adjudicate—which involves vitally the power to find the material facts—and yet deny authority to assure the soundness of the fact-finding process. Without an adequate evidentiary sanction, a party served with a discovery order in the course of an administrative proceeding has no incentive to comply, and ofttimes has every incentive to refuse to comply.

Board administrative law judges have made adverse inferences time and time again. Frequently, an inference is warranted because a party has refused to produce a witness or a piece of evidence in its control and uniquely available to it to explain a particular fact or circumstance, even in the absence of a legal document requiring that witness to appear or that document to be produced. Certainly the inference is equally warranted when a party refuses to produce a witness or a document pursuant to a subpoena. To accept the Management Council's argument that there should be no inference applied would detract from the strength of a subpoena and would provide an incentive to refuse to comply with subpoenas; because, otherwise, administrative law judges have no power to order litigants to produce material by way of contempt or jail.

If adverse inferences may not be drawn, a recalcitrant respondent interested in delaying a Board proceeding would have nothing to lose by refusing to comply with any subpoena, perhaps some attorney's fees in opposing the Board's application for compliance with the subpoena, but little else, in exchange for gaining 3 to 6 months and perhaps delaying and defeating, for example, an organization drive, which often depends on timing for any degree of success. Furthermore, the delay entailed in subpoena compliance proceedings often weakens the will of some parties. An employee terminated because of union or concerted activities may merely be worn down and may settle, instead of waiting for a legitimate claim to be resolved. In addition to delay, compliance proceedings are costly. They necessarily entail the expenditure of additional manpower, which in this day of limited agency funding is precious. The only way to avoid that expenditure is to ensure that parties are aware that adverse inferences may properly be drawn.

The Management Council argues, in addition to its contention that there should be no adverse inference rule, that an adverse inference is inappropriate here for a variety of reasons. First, it contends that it ''voluntarily'' produced the notes for my in camera inspection, which demonstrates that it is not hiding evidence but maintaining a good faith claim of privilege that it does not wish to waive through voluntary production of the notes. I disagree. Whether the Management Council believed in good faith that it was entitled to a privilege or, at the very least, thought that it had a sufficient claim of privilege to support its noncompliance with the subpoena is hardly to the point. Ultimately, I held that its claims of privilege were in substantial part unfounded; and the Board denied its application to appeal specially. The Management Council has had ample notice of the fact that an adverse inference could be drawn from its refusal to produce the notes, and yet it failed to produce them.

Similarly, its contention that its production of Conway's notes resulted from its purely voluntary act is inaccurate. Rather, its production resulted from a belated recognition that I had earlier denied its motion to quash the subpoena, in part, because I could not sustain its claim of privilege without inspecting the notes. It changed its position and produced its notes with the hope that, when I read them, I would agree with its position and reverse my prior ruling. Unhappily for it, I did not agree.

The Management Council's additional argument that it did not willfully refuse to comply with the subpoena because it was attempting to protect its claim of a privilege is not only a non sequitur, but also incorrectly states when a party may escape responsibility for producing matters which have been subpoenaed. If the records, for example, had been lost or destroyed, it might have an arguable position. *Champ Corp*, supra. It supplies no such justification, other than its attempt to perpetuate its losing argument. Also, contrary to its contention, it could have produced the documents and requested that its production not be deemed a waiver of whatever privilege might ultimately be determined by the Board or by a court of appeals. It did not follow that course, either. What it did was to permit its witnesses to testify (at least, up to the point of advising them not to relate material arguably

[24] There is dicta which raises some conceptual problems. Although the court agreed that the adverse inference did not depend on the existence of a subpoena, it disagreed with *Auto Workers v. NLRB* to the extent that it doubted that the willingness of a party to defy a subpoena prior to a compliance proceeding strengthened the force of the preexisting inference. Here, there is no preexisting inference. The Management Council would not have had to produce the minutes of the CEC's meetings to persuade me that it adopted the rule for the reasons expressed by its witnesses. However, once a demand was made (even without a subpoena) for those notes and they were not produced, the reason that they were not produced becomes the issue. The inference here results from dissatisfaction with the reasons given by the Management Council for its failure to comply with the subpoena. Thus, the rationale of *International Medication* may prohibit the inference.

protected by the attorney-client privilege) about what happened at the meetings and then refuse to produce the notes of those meetings. If there were a valid privilege, the testimony of Conway, LeBaron, and Donlan waived it.

Only one reason urged by the Management Council has some slight appeal. The General Counsel had ample time to move for compliance with the subpoena and, at one point in the hearing, represented that he would do so. However, he did not when the Management Council threatened that it would not go forward with any part of its defense until the subpoena issue was fully resolved, a position that, although legally justifiable, was certain to delay the close of the General Counsel's case. The Management Council also argues that the General Counsel proceeded for compliance with subpoenas served upon three newspaper reporters. There is clearly a distinction between enforcing the subpoena served upon Conway and that application, because the reporters were not parties to this proceeding and no adverse inference could be made against any party as a result of the reporters' failure to comply with the subpoenas. Furthermore, the General Counsel wanted those witnesses to prove facts which were his burden to prove.

To the contrary, Conway and his notes were under the control of the Management Council, which had the burden of proving its motivation for promulgating and applying the illegal rule. Although I have found that the Management Council failed in its obligation to prove the CEC's motivation, the General Counsel was not utterly unjustified in seeking to question that motivation, especially since LeBaron, Donlan, and Conway had testified, albeit with certain qualifications, to some activities in the CEC's meetings, and there seemed to be some suggestion that LeBaron made the deadline rule with Donlan's approval and without the participation of the CEC. The notes would have either sustained their testimony or not, and the notes would have supported a finding that the CEC was motivated by certain reasons or not. The notes were relevant, for nothing else than they reflected upon the three witnesses' credibility. The Management Council's suppression of the notes reflects adversely on their credibility and the alleged bona fides of its justification for the rule. *Zapex Corp*., 235 NLRB 1237, 1239 (1978), enfd. 621 F.2d 328 (9th Cir. 1980); cf. *Champ Corp*., 291 NLRB 803.

The issue, then, is how unfavorable that evidence is, i.e., what inferences are appropriate in these circumstances. If the notes are unfavorable to the Management Council, then they are contrary to the testimony of LeBaron, Donlan, and Conway about what happened at those meetings. It is probable that, instead of legitimate reasons being discussed for the deadline rule, either there was no discussion at the meetings, or, at worst, it purposely made a decision to retaliate against the players for their strike.

Under the first inference, I find that the notes would not support the fact that LeBaron and Donlan gave any reasons to the CEC for its adoption of the rule. It is just as reasonable to infer that the CEC gave no thought to the consequences of the rule and passed the rule on its own initiative, for no reason at all, just as it did, as shown above, with regard to the place kickers and punters, and, as will be seen below, with regard to the injured players. (The General Counsel states repeatedly in his brief that the deadline rule was intended to pressure the strikers to return by a day certain so that their names could be publicized in the media.) If the CEC did not consider any reasons for the adoption of its discriminatory rule, it follows that it relied on no legitimate and substantial business justifications for the adoption and enforcement of the discriminatory rule and merely refused to permit the reinstatement of the striking players for no reason.

In so finding, the necessary predicate is that Donlan and LeBaron were not telling the truth about what they reported to the CEC when they recommended the adoption of the various versions of the deadline rule and what the CEC did when deciding not to waive the rule and to enforce it. If the CEC members had credibly testified about their motivation and if the notes had not been withheld, my resolutions of Donlan's and LeBaron's credibility might have been completely different. But the withholding of relevant evidence forces a different conclusion, bringing out various problems that I had with their testimony that I might otherwise have decided were not that critical.

Specifically, Donlan's testimony was sometimes inconsistent and contradictory, and his memory was not particularly sharp. He testified as an adverse witness with much less confidence and clarity than he did months later, when he was called as the Management Council's witness. His recall was then infinitely greater, forcing him to correct his testimony on a number of facts, such as the failure of the Jets to ratify the 1982 agreement, which I thought he should have recalled earlier. LeBaron's memory, too, improved with age, but what was more disturbing was his tendency to inflate some facts to favor his defense of the deadline rule, which was not as wholly justified as he tried to present. For example, one of the factors that gave impetus to moving the deadline for the strikers from Friday to Wednesday was the alleged inadequate performance of the strikers who returned to the Cardinals to play the Redskins. To credit LeBaron would result in a finding that these players were worse than the least experienced collegians. Yet the statistics show that they did not play badly, rather they, at least statistically, played well.[25] In addition, one of those who LeBaron claimed played badly actually reported 10 days before the game was played, so he had ample time to practice, and another who LeBaron used as an example of being susceptible to injury because of returning so late, actually reported on a Wednesday in compliance with the later-adopted deadline rule.

LeBaron's tendency to exaggerate to favor his client was shown in his insistence that an impact player for the Falcons, William Andrews, was injured in 1984 only because of his poor physical condition because he was a holdout for a lengthy period and was injured on the third day after he returned. Actually, Andrews had reported to training camp one

[25] Generally, as Coach John Robinson of the Rams admitted, statistics are often very misleading, and I make this argument with some caution. Various factors could easily make a returning striker look bad. If he is a quarterback, all he needs is mediocre receivers or offensive linemen to show off his worst side. On the other hand, when the General Counsel argues about the virtues of some of the replacement players, all they need is even worse players around them to make them appear as a Gale Sayers, Bronco Nagurski, and Superman, all in one. In sum, these arguments based on statistics must be considered with utmost care. Here, however, LeBaron was ready to blame the returning strikers for being in bad condition, and there was no objective evidence to support his judgment.

day late and was injured a month later. LeBaron also blamed the failure of four Broncos to play on their poor condition and the lack of time to properly train them. Those players, however, refused to play because of their desire not to play with the replacement players when their colleagues were out on the picket line.

Finally, if the Management Council had legitimate reasons, surely the CEC members would have testified and the Management Council would not have withheld the notes of the meetings. As this record stands, there were no reasons proved and the Management Council did not sustain its burden of proof under *Great Dane*. On this basis alone, I conclude that it violated the Act. See *Cedar Falls Health Care Center*, 276 NLRB 1300, 1303 (1985).

The second inference, which I find is equally probable, results from an examination of the circumstances of the last week of the strike to reconstruct what happened at the CEC's meetings. That week was, at best, a time of frantic activity. At the beginning of the week, all parties knew that the Union's strike was crumbling. Donlan knew that the strike was over. CEC member Joe Robbie predicted on Monday the return of the players on Tuesday and Wednesday in record numbers. On Monday Upshaw announced his back-to-work proposal, and no union leader announces a back-to-work proposal when he is winning a strike. (Only LeBaron testified that he did not know that the strike was coming to an end. I do not believe him.)

It is thus likely that the CEC would meet to discuss that proposal, as Donlan testified; and, because the Union was offering to return to work but wanted to freeze all teams' rosters so that only those players on the rosters before the strike could play, it is probable that the CEC would consider its response to the Union's proposal, as in fact it did, when it agreed that the players should return and offered a two-game guarantee to the players. It is also likely that Donlan, as the Management Council's principal negotiator, and LeBaron, as coordinator of the replacement season, both of whom had been in constant contact with the CEC, would have attended the meeting because the CEC would have discussed the ramifications of the back-to-work proposal as it affected future labor relations (thus, Donlan's attendance) and the continuing conduct of the replacement season (thus, LeBaron's attendance). Certainly, if Conway, who was Donlan's assistant, was present at and taking notes of the meeting of the governing body, particularly the meeting of October 13, it would be unlikely that Donlan and LeBaron were absent at this critical time.

The record evidence reveals that some part of the notes of the October 13 meeting pertains to the deadline rule. Donlan's recollections of the discussions of the rule were none too clear. He testified that, if there were discussion of the rule at the meeting, it was only to the extent that the rule was working well and should remain in effect. Why he was even hesitant in even conceding that the application of the rule was discussed reflects poorly on his memory. The Management Council's memorandum of October 14 concedes that the CEC discussed the waiver of the rule the day before. The withholding of the notes makes it probable that his testimony was inaccurate and that the CEC deliberated in depth about the advantages of the return of the veteran players and the enforcement of the rule if a favorable agreement with the Union could be made. For, despite my inclination that the rule might have been well justified, if only the Management Council had proved that it was motivated by the reasons it gave at the hearing, the legitimacy of the rule was not free from doubt or attack for a variety of reasons. For example:

(1) There is evidence in this record that indicates that the deadline rule was not as necessary as LeBaron, Donlan, and others testified. Perhaps the most appealing testimony in this entire case, at least on its face, was given by three of the NFL's distinguished coaches (Bill Walsh, 49ers; Dan Reeves, Broncos; and John Robinson, Rams), who stated that they had recommended the deadline rule to LeBaron because they did not want to jeopardize the safety of their players, who would be in poor playing condition and susceptible to injuries, and because they wanted to have well-trained athletes available to play a competitive game that Sunday.[26]

Sometimes, however, witnesses' words are belied by their actions. Robinson apparently thought that winning was more important than all of the reasons he gave for the deadline rule. He disregarded the deadline rule and brought in 12 key players after the deadline on October 14. In an attempt to give his team the best chance of winning, while concealing what he was doing, Robinson did not select all starters, but picked some starters and some ''capable'' backups. Some of those players reported as late as Friday, October 16, were given 45-minute instructions on the new game plan (which was essentially the same as they had been taught in weeks of training camp), and were ready to engage in practice. But for the fact that their Sunday opponent, the Falcons, found out that these players had not returned prior to the deadline and complained to the League's office, these players would have been on the playing field. Thus, Robinson, who testified that football conditioning falls apart after a week without practice, did not believe that health and safety and proper conditioning were as important as the Management Council desired that I believe. His actions temper my enthusiasm for his testimony and that of the others.[27] Reeves was equally eloquent in his defense of the deadline rule, but theory, at least once, was not substitute for expediency. He testified that he would not start an offensive player who had missed the Wednesday offensive practice, to support the idea that players had to be prepared and trained well before he would play them. However, he started fullback Bobby Micho in the first replacement game despite the fact that Micho had returned only the Friday before.

(2) LeBaron testified that the vast majority of the coaches and general managers actually favored the deadline rule, but that testimony was inconsistent with the reaction of many of

[26] Although Bobby Beathard, general manager of the Redskins, testified that he also preferred that the replacements play, he earlier stated that, because the Redskins were playing against the Cowboys on Monday night, he hoped that the deadline rule would not apply. That means that he was hoping to play his regular team, not the replacements. Oilers Head Coach Jerry Glanville told quarterback Warren Moon that the reason why Schramm did not want the striking players to return is that he thought that his replacement team could beat the Redskins' replacement team. Obviously, I am not accepting this rumor as fact, except to note that the subjective judgments of whether to enforce or not enforce the deadline rule could have been based on reasons far removed from those which might be found to be legally justified.

[27] LeBaron, in supporting Robinson, misstated the facts of this episode, which was no mere oversight but a flagrant attempt to avoid the rule.

them when the players returned on October 15. A number of coaches, Walsh included, and general managers and even team presidents and owners greeted the players' return with statements that they wanted the players to play in that weekend's games, but they were prohibited from playing them solely because of the Management Council's deadline rule. Buddy Ryan, coach of the Eagles, had ''no doubt in his mind'' that the players would have been ready to play on Sunday and would win on Sunday. Indeed, even Donlan was aware of the coaches' position, but he noted that the Management Council had to act as a buffer to enforce the will of the owners and management. In so explaining, he said that coaches' jobs rely upon their win/loss records, an apparent concession that the coaches felt more comfortable playing their returning veterans, rather than the replacements. Thus, I find that many Clubs would have been delighted to play their regular players, rather than the replacements.

(3) Whether the coaches and general managers were really as concerned with the safety of their players (and, particularly, the loss of impact players) and conditioning and time to train players, as LeBaron testified, was subjected to doubt by the actual treatment of players who had not played football or engaged in rigorous practices for long periods of time. The Management Council contends in its brief that ''the loss of a key player can have a significant impact on the success of a football team'' and, quoting George Young, the general manager of the Giants, ''the team that has the least injuries has the best chance of winning.'' But the Giants risked its impact player, Lawrence Taylor, who returned the Wednesday before the final replacement games and played that Sunday in not only all 81 defensive plays but also, for the first time in his playing career, some offensive plays. This record does not support the proposition that, if Taylor returned on Thursday, there would have been any difference in his playing time. Rather, the record is replete with evidence of other players, including replacement players, reporting late in the week, after long periods of being away from professional football, and participating in many plays.

In addition, many players have been injured during the regular season and have been unable to practice with their teams during the week, sometimes for 4 or 5 weeks in a row. Yet, when game day comes, there are those same injured players, such as Dan Hampton and Jim McMahon of the Bears, too injured to practice, but still out on the playing field in the thick of the contest. Players who have been nominated to play in the Pro Bowl, played after the Super Bowl, often have not played football for many weeks, especially those who have not played on better teams. Many of these players are impact players. Bill Fralic of the Falcons, which did not make the playoffs, had 6 weeks of no football and relatively little exercise, before practicing one and one-half hours from Tuesday to Saturday and playing on Sunday. Former player Stan White testified that both the offensive and defensive game plans could be learned in one day and that having only one day of practice, on Saturday, without full pads and contact, would have made no significant difference. At the end of the 57-day 1982 strike, although most of the teams returned on Wednesday, some of their players did not return until Thursday or Friday. Two teams did not return from the strike until Thursday, and their players still played on Sunday. In fact, one of the teams (the Lions) played on Sunday and the next Thursday, so the players played two games in the 8 days after their return to football after a 57-day absence.

Finally, there was no evidence suggesting an unusual increase of injuries after the 1982 strike which would warrant the Clubs' sudden concern for injuries in 1987. Rather, the cumulative evidence indicates that coaches will play their players when the players are needed, and they will not play their players when they are not needed. Thus, it is in the nature of football, as will be seen in the discussion about the injured players, that players are hurt, and this record shows that they play hurt. I conclude that the players would have been able to play in the last weekend's games, even if they reported a day or two late for practice.

Indeed, the exercise physiologist who testified as an expert on behalf of the Management Council stated that there would have been no difference in the improvement of the players' condition if they reported on Thursday rather than Wednesday and that, if the players began their contact drills on Thursday, they would suffer less soreness on Sunday than if they began practicing on Wednesday. Young agreed that the strikers' return on Thursday instead of Wednesday would not have made a significant difference in their physical condition. Walsh testified that, if the players had reported on Wednesday, he would not even have had them engage in full contact practice. They would have engaged in minimal practice in shoulder pads and helmets.

(4) There is considerable doubt that the CEC actually dictated that there could be no waiver of the deadline rule, as LeBaron and Donlan testified and two memoranda state. In the last week of the strike, negotiations for a back-to-work agreement were being held in Kansas City and New York. Although there was never a final agreement reached and the negotiations began outside the formal negotiating structure of the CEC and Donlan, Lamar Hunt, the owner of the Chiefs and president of the American Football Conference of the NFL, one of the League's two conferences, wanted his players to return, and the agreement that he proposed called for the players to ''resume practice and play immediately.'' Discussions continued on that settlement even though the deadline had passed. Donlan had been advised of these negotiations; he spoke to representatives of the Chiefs even after the deadline had passed; and, although he had certain reservations about the terms of the agreement, he raised no objection to the provision requiring the immediate return of the strikers and their playing that weekend.

That the deadline was not so firm was also evident from Tex Schramm's television interview on October 14, in which he said:

> Under our present policy . . . the deadline was Wednesday at 12 o'clock Dallas time and any players or teams that came in after that time would not be eligible to play this Sunday. Therefore if the entire Union elected to come in as a group then they would seek a waiver of that rule. If . . . individual teams decided to come in there would be no waiver of that rule.

Because Upshaw had earlier announced that the Union was proposing to return to work, and Schramm must have known, as a CEC member, that negotiations were going on, Schramm's statement clearly implied that there was a possibility that, if the back-to-work settlement negotiations were

successful, the Management Council would waive the deadline rule. That contrasts with what would happen if individual teams returned. Then, there would be no waiver. Indeed, Schramm's testimony creates a doubt about much of the Management Council's testimony, for if there truly had been a decision by the CEC in its meeting of October 13 that there would be no waiver of the rule, Schramm would not have held out hope that the rule would be waived.

While Schramm spoke of the possibility of a waiver, Donlan said nothing in the New York back-to-work negotiations which would deny that possibility. He countered the Union's proposal for the return of the strikers and a freeze of personnel with his proposal that the Clubs would bring back all players with a two-game salary guarantee. He never mentioned that the deadline applied to this provision, and Upshaw thought that there was no deadline. Upshaw was also dealing with NFL Commissioner Pete Rozelle[28] as late as 11:30 p.m. on October 14, with the demand to put the players back to work immediately, but Rozelle never mentioned that the guarantee depended on when the players returned from their strike. Upshaw spoke with Donlan the following morning at about 10:45 a.m. The proposal to put the players back to work was still on the table. Yet Donlan said nothing about the deadline applying. It was only when Donlan changed his proposal at about 12 noon on Thursday to the three-game guarantee that the Union had asked for the day before that he mentioned the deadline for the first time, that the agreement would commence the following week because the Wednesday deadline had been missed.

I find that the deadline rule was not etched in stone. If the negotiations had worked out to the CEC's satisfaction, the players would have been permitted to play that weekend.[29]

(5) There was also good reason for the owners to want the players to return. Attendance at the replacement games was far less than during the regular season, and, although improving, was not close to what the attendance had been in the first 2 weeks of the season. Sales of food and beer and concessions were down. Of particular importance, although the Management Council's witnesses tended to minimize the adverse effect that the replacement games had on the League's television revenues, which constituted 60 percent of the Clubs' revenues and depended on ratings for their continued receipts, there is no question that fewer people watched the replacement games on television than the regular games. The reasonable inference is that viewers were less interested in seeing the replacements than the regular players, particularly the stars of the NFL, and less interested in rooting for players that they were not used to watching.

Furthermore, most of the the Management Council's witnesses expressed a general dislike for the replacement games, which were obviously not of the quality of the games played by the strikers. No one wanted to see the game of professional football played by players who were less than the best. As CEC member Dan Rooney said in a television interview on October 4: ''I would like to see us reach an agreement and get everybody in and play football the way we're supposed to.'' On October 10 John Jones, the public relations director for the Management Council, instructed the officials of the Clubs to answer a question from the media about the length of the strike: ''The clubs want the regular players back as soon as possible.''

The reason for the replacement season was to prevent the catastrophe of the 1982 strike from recurring, to ensure that fans would remain fans for seasons to come and to ensure that television revenues would continue to generate increasing revenues. By refusing to permit the veteran players to return, the owners were merely adding to the harm done by the strike in the long run. In the short run, the League's television contract required a rebate of $40 million because of the low ratings of the replacement games. With the threat of losing millions of dollars of income, the Clubs must have discussed whether it would be better to have the regular players return for the games of October 18 and 19, just to cut their loss of television revenues.

In sum, if many coaches and owners and general managers wanted to permit the strikers to return, even though the deadline had passed; if safety and conditioning were not as significant factors as some testified; and if the owners were to suffer financially if the replacements continued to play another game—one would think that at least some consideration would be given by the CEC to the choices available to it as to whether to insist that the deadline be complied with or whether it should be waived. Because the notes were not produced, no one will ever know with certainty what the members of the CEC were thinking; but it is reasonable to infer that the CEC adopted and enforced the rule not for legitimate reasons, such as those set forth in its memorandum of October 7. Those were pretexts and not the actual reasons, again because, if the CEC had a legitimate motivation, the Management Council would have had no reason to defy the subpoena and withhold the notes which may have sustained its otherwise compelling case. It is equally reasonable to infer that there is something distinctly unfavorable in the notes, enough to sustain the inference that revenge against the Union for striking entered into the thoughts of the CEC's members in their either adopting the rule or refusing to permit the players to return even a minute after the deadline. Under either inference, I find that the Management Council violated Section 8(a)(3) and (1) of the Act by adopting the discriminatory deadline rule and that it and the Clubs violated Section 8(a)(3) and (1) by enforcing it.[30]

The Clubs, however, contend that they were entitled to delay the players' reinstatement because *Drug Package Co.*,

[28] The Management Council denied that Rozelle was its agent or representative for any purpose. However, during the negotiations, Upshaw made clear that he would not deal with Rozelle unless he agreed that he was representing management. Upshaw testified that he agreed, and Rozelle did not testify in this proceeding. By virtue of his broad powers as Commissioner, he clearly had some access to management; but there is nothing here except for an effort by him to get the parties together. The fact that he may have sided with the Management Council on certain issues did not mean that he did not take the Union's position in his private dealings with Donlan and owners. His silence in the negotiations suggests that he may have understood that, if all the other demands and counterproposals had been agreed to, the deadline rule might not be an obstacle.

[29] Jim Finks, the Saints' general manager, so understood. When the Saints' players returned on October 15, he promised that if the Union would accept the back-to-work proposal offered by the Management Council, the players ''might'' be able to play and might even be paid without playing.

[30] These findings make it unnecessary to decide whether the deadline rule was inherently destructive of protected rights under *Great Dane.*

228 NLRB 108 (1977), modified 510 F.2d 1340 (8th Cir. 1978), on remand 241 NLRB 330 (1979), permits 5 days to reinstate returning strikers. The strikers, they argue, were allowed to return to their regular jobs on the Monday following the Thursday when they requested reinstatement, well within the 5 days allowed by Board law.

The Board recognized in *Drug Package* that there were ''administrative difficulties entailed in reinstating large numbers of striking employees on short notice. An employer requires at least some time to effectuate the strikers' orderly return and, if necessary, to discharge the lawfully hired replacements.'' Id. at 113. Here, there could have been ample reasons for the Clubs' need to delay the return of the strikers. It may well have been that it was too difficult for certain teams to discharge the replacements at the very last moment and rehire the regular players, put them on an airplane, fly them long distances, while simultaneously instituting a game plan for them to use in a day or two, without even knowing what the physical condition of those players was and whether they would be able to play without permanent injury.

However, the Clubs did not rely on these reasons or any other ''administrative difficulties.'' The Clubs relied almost exclusively on the ground that the players had returned too late under the deadline rule, which on its face discriminated against the strikers. In numerous cases, the Board has ruled in what is now ''canned'' language that there can be no grace period when an employer ''rejects, unduly delays, or ignores any unconditional offer to return to work, or attaches unlawful conditions to its offer of reinstatement . . . [because] the 5-day period serves no useful purpose and backpay will commence as of the unconditional offer to return to work.'' See, e.g., *McCormick-Shires Millwork*, 286 NLRB 754, 755–756 (1987); *Canterbury Villa*, 273 NLRB 1196 (1984). The 5-day period serves no useful purpose when the Clubs, rather than pleading their administrative difficulties, merely rely on a discriminatory rule which violates the Act; and *Drug Package* does not apply.[31]

The General Counsel alleges that the Clubs and the Management Council constitute a single employer for the purpose of liability and all are equally responsible, jointly and severally, to remedy the violations of the Act. *NLRB v. Browning-Ferris Industries*, 691 F. 2d 1117, 1122–1123 (3d Cir. 1982), contains a classic analysis of the single employer status and how that status differs from a joint employer. The court explained, at 1122: ''A 'single employer' relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a single employer.'' The Board considers four factors: (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. The Clubs are not owned by the same owners, nor are they managed by the same managers. Through the Management Council, they probably have centralized control of labor relations, certainly in the replacement season. To form a product, each Club needs the other Clubs to compete with, so the test for integration of operations is undoubtedly met. But at best only two of the four factors apply, and that misses the Board test by half.

The relationship among the Clubs is far closer to that of a joint employer, which *Browning-Ferris* notes, at 1122, does not depend on the existence of a single integrated enterprise, but rather assumes that there is more than one entity and that the entities ''*share* or co-determine those matters governing the essential terms and conditions of employment.'' Id. at 1123. The Management Council came very close to becoming a joint employer by demanding, during the 1987 negotiations, that it assume the responsibility for negotiating with the players all compensation, over and above what the collective-bargaining agreement would require under its proposal. But the test of joint employer status is not wholly satisfactory when applied to the NFL, because 49ers' Quarterback Joe Montana's salary is not determined by the Dolphins and Dolphins' Quarterback Dan Marino can hardly be considered to be playing for the 49ers.

Recognizing that the standard tests for determining ''single employer'' status are not completely applicable and that the status of the Clubs is at best a hybrid, the General Counsel contends that the Management Council and the Clubs operate as a joint venture in running football games, relying on *Great Lakes Dredge Co.*, 240 NLRB 197 (1979). The Board explained, at 198, that the rules governing partnerships are, for the most part, applied to joint ventures. Thus, each partner acts individually and as agent for the other members, and each joint venturer is the agent and partner of the other and liable as a principal for any act within the general scope of the enterprise.

There is no question that much of what the Clubs do is a joint business undertaking to produce an entertainment product, which could hardly be effective without their joint participation and consent as to the most basic items, such as scheduling games and permitting their games to be televised. Most courts have recognized that sports leagues share many of the characteristics of a joint venture. For example, see *Smith v. Pro Football*, 593 F.2d 1173, 1178–1179 and fn. 19 (D.C. Cir. 1978, as amended Jan. 31, 1979); *Los Angeles Memorial Coliseum v. NFL.*, 468 F.Supp. 154, 162–164 (C.D.Cal.1979) (wherein the NFL asserted that it was a joint venture, but the court did not rule on the issue). By definition, however, a ''joint venture'' is a joint business undertaking by two of more parties who agree to share the risks as well as the profits of the venture. *Pinnacle Port Community Assn. v. Orenstein*, 872 F.2d 1536, 1539 (11th Cir. 1989); *Davidson v. Enstar Corp.*, 848 F.2d 574 (5th Cir. 1988), on rehearing 860 F.2d 167 (1988), rehearing denied 864 F.2d 791 (1988). The Clubs, to the contrary, normally share revenues only, although the Management Council's bylaws provide that any Club that ''suffers inordinate loss or damage by reason of a strike or by reason of an action of the CEC on any 'emergency matter' may be reimbursed by'' the other Clubs.

No matter whether the Clubs are classified as a single or a joint employer, the record shows that the Clubs, by means of the Management Council, acted together in establishing the rules which led to the alleged unfair labor practices herein. The Clubs gave the CEC of the Management Council the

[31] In light of this finding, it is unnecessary to rule on the Union's additional claims that (1) *Drug Package* should not apply because a delay of 5 days would result in players being denied one-sixteenth of their yearly wages, whereas in other industries, employees are denied at most 1 week's pay; and (2) the normal rule should not apply because the return of the strikers did not cause the discharge of the replacements, who played that first weekendand 40 of whom were placed on an inactive roster for the next weekend and were paid for that game, too.

authority to act in the event of an ''emergency,'' and the Clubs' representatives elected the members of the CEC who adopted the rules which gave rise to the major unfair labor practices alleged in this proceeding. The CEC effectively controlled the operation of the replacement season during the term of the strike. The CEC established the playing rules and all other operational aspects under which the League operated and virtually assumed the functions of an employer by actually establishing the terms and conditions of employment of the replacement players.

The Management Council prepared the option agreements whereby the players in training camp would agree to play during the replacement season. It advised the Clubs about the player who were available for hire. It established when the replacements could report and directed that they take physical examinations. It promulgated when the replacement players would be paid and directed that they would not be paid for canceled games. It sent memoranda to all officials of the Clubs telling them how to answer specific questions from the media. The CEC's deadline rule, which was enforced by the Clubs, affected the right of the strikers to regain their jobs.

In *National Football League Management Council,* the Board had no difficulty directing all the Clubs and the Management Council, jointly and severally, to reimburse certain players who had been fined for violating a rule adopted by the Management Council. To the same effect, by adopting, through the CEC, the relevant rules which were binding on the Clubs and gave rise to the unfair labor practices alleged herein, the Management Council and the Clubs were engaged in a joint venture to operate, at the very least, the replacement season. They are jointly and severally liable for any violations herein, other than those found against the Patriots and the Cowboys. Alternatively, the Management Council is similar to a multiemployer association which bargains for its members. Although the association is usually considered a separate entity, it has been held jointly and severally liable when it acts with its members in violating the Act. *Restaurant Assn. of the State of Washington,* 190 NLRB 133, 140 (1971); *Pacific American Shipowners Assn.*, 98 NLRB 582, 600 (1952).

The joint and several liability incurred as a result of my conclusion is not such a hardship. Rather, it is in part the natural consequence of the fact that the Management Council is an unincorporated association. As such, its individual members are responsible for all liabilities incurred in the business for which it was organized, especially because the members voted for the CEC and, in the bylaws, the members authorized the CEC to act on behalf of the organization. 6 Am.Jur.2d, *Associations and Clubs* § 46. Besides, the Management Council's articles of association provide that all costs and expenses of maintaining the Management Council shall be divided equally among its members. Therefore, even without my conclusion, a finding of joint and several liability against the Management Council would result in the Clubs being severally responsible for their equal share of the Management Council's liability.

The complaint alleges an alternate theory of liability, that even if the Clubs refused to play the returning strikers, they should have paid them. Contrary to the General Counsel's contentions, the Clubs never committed themselves to paying the players, even if they were ineligible to play.[32] No striker who returned after the deadline was permitted to play, and none of those players were paid. Nor do I find any credible evidence which proves the contrary, the necessary result of which is that players returning 5 minutes before kickoff would, under the General Counsel's theory, be entitled to pay, even though they were not allowed to play and did not even have the time to lace their shoes. If the entire theory of the deadline rule, often repeated in the General Counsel's and the Union's briefs, was to coerce players across the picket line and to publicize their return, it is impossible to conceive why the Management Council would wish to reward those players who did not make the deadline with the payment of their salaries, which averaged $15,000.

Accordingly, I will not credit the statements attributed to Conway and Jones in two newspaper articles. The cross-examination of the two reporters who testified that they made such statements was so limited by a court order that I have an insufficient record to rule on their credibility. Even if I found that Conway and Jones made those statements, they would have reflected no more than an understanding that through negotiations, the players might still be paid even if they did not play. Some team owners appeared willing to do so. However, the Management Council never committed that it would do so; and the CEC, which ran the replacement season, never adopted that policy.

The General Counsel contends that some returning strikers were paid despite the fact that they were not eligible to play. Some were placed on a ''Commissioner exempt'' status, which permitted the Clubs 2 weeks to determine whether a player who had missed some time was physically fit to play. These players practiced with the teams and could have been activated to play by Saturday at 4 p.m. However, these players had reported prior to the deadline, whereas the players for whom the General Counsel seeks relief were under no circumstances eligible to play. Complaint is also made against the revision of the roster rules which permitted the Clubs to retain 40 players on their inactive list for the games of October 25 and 26, and 5 thereafter. These players were paid despite the fact that they did not play. The reason for continuing them on such a list was, according to Donlan, the fear that the veterans would once again strike. Although I have some doubts about this reason, because there was no evidence of even a hint that the veterans were going to resume their strike, I know of no prohibition against the retention of the replacement players. Furthermore, I know of no reason why the Clubs would want to retain the replacements and incur the added cost, unless they discovered in the replacement games that they had underrated certain players who were cut and now wanted to keep and develop them.

The Board announced in *General Electric Co.*, 80 NLRB 510, 511 (1948): ''It is axiomatic that the Respondent is not required under the Act to finance an economic strike against it by remunerating the strikers for work not performed.'' There, the employer paid certain of its employees who were in different bargaining units and who were unable to work because of a strike. Because those employees made their services available during the strike and remained ready to

[32] The Union understood this. On October 9 it filed an unfair labor practice charge against the Vikings for allegedly offering to pay strikers even if they returned after the deadline.

work, they were stand-by employees and were entitled to be paid as a matter of law. Id. at 512. Here, the players on the inactive list were ready to play, if activated. Indeed, the expired collective-bargaining agreement provided that the Clubs may determine to have an inactive list of any number of players per Club and that inactive list players will receive the same benefits and protections as active list players. The Clubs' payment of wages to employees who were not active players was in accord with the practice permitted under the expired agreement and created no obligation to pay the striking players.

The final group of employees about whom the General Counsel complains consists of 15 players on injured reserve status, which will be discussed in detail in section C below. Suffice it to say at this point that the reason why there is so much discussion to come is that the complaint alleges that the Clubs should have continued to pay numerous injured players who had been paid before the strike and were too injured to play during the strike. Here, the General Counsel is attempting to establish liability for almost 1100 strikers (at an average of $15,000 per game, totaling almost $16.5 million) on the ground that the Clubs paid 15 injured players, as they legally should have, when in the same legal proceeding the General Counsel complains that the Clubs did not pay other injured reserve players. In other words, if the Clubs had not paid the first group of injured reserve players, the General Counsel would have complained that the Clubs committed a violation of the Act. However, because they paid them, the Clubs should have also paid all the strikers. I find no logic in its position and will recommend dismissal of this allegation.

B. *Cessation of Checkoff of Dues*

The last collective-bargaining agreement provided, as noted above, that a team could have no more than 45 active players on its roster during the regular season. During training camp, however, each Club tries out as many as 100 players, including veterans, in order to select those whom it deems to be the best for the team. Traditionally, there have been a series of dates scheduled for the teams to cut down their rosters. The agreement, which expired by its terms on August 31, gave to the Clubs the right to determine the dates for the preseason cutdowns. The complaint alleges that the Management Council deliberately delayed that first cutdown date until September 1, the day after the agreement expired, in order to prevent the Union from collecting its first installment of dues under the checkoff provision, which states:

> Commencing with the execution of this Agreement, each club will chaek-off [sic] the initiation fee and annual dues or service charge, as the case may be, in equal weekly or biweekly installments from each preseason and regular season pay check, beginning with the first pay check after the date of the first pre-season squad cutdown, for each player for whom a current check-off authorization . . . has been provided to the club. The club will forward the check-off monies to the NFLPA within seven days of the check-off.

The General Counsel correctly notes that since 1976, there were always three cutdowns, the first taking place after the second preseason game. (Donlan testified that the only other year in which there were less than three cutdowns was in 1974.) Following this practice, the first cutdown in 1987 would have occurred on August 25. The Clubs contend, however, that they were anticipating that the Union would strike and that they would continue the season with replacement players. In order to train sufficient numbers of replacements who would be able to step in immediately to play if a strike should occur, the Clubs needed additional time to train them in preseason camp. The NFL competition committee, therefore, recommended in March that there should be only two squad cutdowns. The cutdown dates are traditionally measured backwards from the first regular season game, which was scheduled to be played on September 13, unusually late because Labor Day fell on September 7, and the League for years started its schedule the weekend after that holiday. The cutdown dates were the Monday before the first regular game, and then the preceding Tuesdays. The second Tuesday before the opening game was September 1, which happened to be the day after the agreement expired. There was no discrimination here, argue the Clubs, because there was no prohibition against having only two cutdown dates; and, otherwise, the Clubs' practice was the same as it always had been and was legal.[33]

The General Counsel sees something much more sinister in the Clubs' actions. During the negotiations, on August 5, Berthelsen argued that the September 1 expiration date for the agreement was not applicable. Instead, the agreement did not expire until September 15 because Donlan never gave sufficient notice to terminate the agreement under the Act and the contract. Donlan replied that he did not care what Berthelsen's position was, ''there is no way we're going to check off dues in 1987.'' When Berthelsen asked why, Donlan replied, ''[B]ecause the clubs aren't going to pay the union to fight them.'' Upshaw's recollection of Donlan's response was somewhat the same: ''I don't care what your legal position is on this, there will not be any dues checkoff for the 1987 season.'' The following day Donlan reported to the Clubs about what had happened the day before and, specifically, about the Union's request for dues checkoff. He said that dues checkoff was very important for the Union and that the Union would be seeking relief from anyone who would listen.

Donlan, disputing the testimony about what he said on August 5, presented a slightly different narration, after an original rather bumpy statement of what happened, including sufficient indications that his memory of the events was not particularly good. I do not credit his testimony, and I note that he could not remember enough that he could specifically deny making the statement. Dennis Curran, a staff attorney for the Management Council, testified that he was present throughout the conversation. He surely would have corroborated the testimony of Donlan if he agreed with it, or would have taken issue with what Upshaw and Berthelsen had testified to, if his recollection was different.

I, therefore, credit the union representatives; but in doing so, I find that the disagreement between Berthelsen and Donlan was not over the propriety of delaying the cutdown

[33] There is no obligation to check off dues after the expiration of the collective-bargaining agreement. *Bethlehem Steel Co.*, 136 NLRB 1500 (1962), enfd. in pertinent part sub nom. *Shipbuilders v. NLRB*, 320 F.2d 615 (3d Cir. 1963).

date until after the agreement expired. Their disagreement encompassed whether the agreement expired on August 31, which allowed the Management Council not to check off dues because the first cutoff date was on September 1, as Donlan insisted, or whether the agreement had been extended by Donlan's neglect, as the Union contended, so that the agreement would still be in effect when the first cutoff date arrived. Donlan's position was that, if there were no agreement—and there was a strike—there would be no checkoff of dues, which could only be used by the Union to support the strike.

The question then is what motivated him to take this position and not turn over to the Union the first installment of dues. In making the following findings, I specifically credit the testimony of Donlan and Bill Walsh, coach of the 49ers and member of the competition committee, and note that there had already been a preliminary determination that at least plans should be made in anticipation of a strike by the Union. Thus, in April the Management Council had sent out to the Clubs a proposed option agreement for those who were cut from the Clubs in training camp to agree to return to play replacement games in the event of a strike. The League had also determined that there would be only two cutdowns. That had been recommended by the NFL's competition committee in March and adopted by the NFL on May 20. It had been recommended not because it would deprive the Union of its dues payment but because the competition committee believed that it would be better for the Clubs to have more time to evaluate all the players in training camp and to prepare those who were ultimately cut, to play in the replacement games should there be a strike. Because many Clubs wanted this additional time to prepare the prospective replacement players, there was much support for only one cutdown date, the week before the opening of the season, but they finally settled for two cutdown dates. The preparation of replacement players is a nondiscriminatory reason.

When Donlan announced on August 5 that there would be no dues checkoff, Upshaw and Berthelsen tried to persuade him that the agreement survived its September 1 expiration date and was extended because of his ineptitude. His reply was his feeling that he was not going to extend the terms of the agreement past its expressed expiration date merely because Berthelsen was making a technical argument that the agreement had been extended for 15 days. Donlan was expressing why he would not accede to an extension of the agreement. He was not stating why the Management Council determined when the cutdowns should take place. I conclude that this allegation should be dismissed.

C. *The Injured Reserve Claims*

The NFL player contract[34] provides protection to players who are injured during the season, as follows:

> If Player is injured in the performance of his services under this contract and promptly reports such injury to the Club physician or trainer, then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and, in accordance with Club's practice, will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period, as Player is physically unable to perform the service required of him by this contract because of such injury. If Player's injury in the performance of his services under this contract results in his death, the unpaid balance of his yearly salary for the season of injury will be paid to his stated beneficiary or, in the absence of a stated beneficiary, to his estate.

Of the many players who reported to the Clubs' facilities on October 15, some were players who had been so seriously injured prior to the strike that their Clubs had placed them on injured reserve status, which meant that the Clubs guaranteed them their pay for the remainder of the season or as long as they remained injured and that the players were not permitted to play for a minimum of 4 weeks and until their Clubs designated them as active players.[35] When the Union terminated its strike, these players were still on injured reserve.

1. Reinstatement: a reprise

I have already concluded that those players who reported on October 15 were entitled to be paid for that weekend's games because the rule discriminated against the strikers and the Management Council failed to prove that it had any reasonable justification for the rule. That conclusion applies with even more force to the injured reserve players; for even if I had reached the issue of, and agreed with, the Clubs' alleged reasons for their refusal to permit their healthy players to return to work, none of those reasons applied to the injured players.

The Management Council's reasons for the rule—safety of the players, who needed time to return to football-playing condition, and competitive balance and preparedness for play—were aimed at players who were ready to compete. They were not intended to apply to those who could not play; and the Management Council's witnesses were uniformly taken aback when asked why the Clubs did not permit the injured reserve players to return even after the deadline, because they would not have played in the games anyway. Rather, the demeanor of these witnesses persuades me that no thought could have been given to the injured reserve players when preparing the deadline rules.

When the injured players returned to work that Thursday, the most that the Clubs could have required of them was to rehabilitate at the Clubs' facilities and to attend the Clubs' practices. I infer that the returning injured reserve players were ready to comply with those requirements, but the Clubs lumped them together with the multitude of physically fit players and treated the injured players, without any justification, reasonable or not, as if they were offering to play. The Clubs had given no reason for their refusal to permit the injured players to return. I conclude that the Clubs violated the Act by applying the deadline rule to those injured reserve players who offered to return to work on October 15.

[34] The collective-bargaining agreement provided that all players sign a standard player contract.

[35] One player was classified as physically unable to play (''PUP''), which in his case did not alter the Club's obligation to pay him his regular game pay.

2. Individual claims

I turn, then, to the remaining claims of the injured reserve players, most of whom were not paid for more than just the last replacement game and were not paid for the weekend of the canceled games. The themes that run through this portion of the complaint are that, when the strike began, the players were injured and, with one exception, had been placed by their Clubs on injured reserve, that they remained on injured reserve for the entirety of the strike, and that all the players were so severely injured that they could not have played during the strike anyway, whether they were on the injured reserve list or not. Indeed, most of the players were incapacitated for the entire season.

Immediately before the strike began, the Clubs paid the injured reserve players for all games following their injuries, as the player contract required. Once the strike began and for the duration of the strike, the Clubs stopped paying them. The complaint alleges that the Clubs violated Section 8(a)(3) and (1) by withholding their pay during the strike for periods during which the players were otherwise eligible for pay. Whether the Clubs' suspension of pay violates the Act must, under *Texaco, Inc*., 285 NLRB 241 (1987) (*Texaco*), be resolved by application of the *Great Dane* test for alleged unlawful conduct, quoted above. The Board stated, 285 NLRB at 245-246:

> Under this test, the General Counsel bears the prima facie burden of proving at least some adverse effect of the benefit denial on employee rights. The General Counsel can meet this burden by showing that (1) the benefit was accrued and (2) the benefit was withheld on the apparent basis of a strike. . . .
>
> Once the General Counsel makes a prima facie showing of at least some adverse effect on employee rights the burden under *Great Dane* then shifts to the employer to come forward with proof of a legitimate and substantial business justification for its cessation of benefits. The employer may meet this burden by proving that a collective-bargaining representative has clearly and unmistakably waived its employees' statutory right to be free of such discrimination or coercion. Waiver will not be inferred, but must be explicit. If the employer does not seek to prove waiver, it may still contest the disabled employee's continued right to entitlement to benefits by demonstrating reliance on a *nondiscriminatory* contract interpretation that is ''reasonable and . . . arguably correct,'' and thus sufficient to constitute a legitimate and substantial business justification for its conduct. Moreover, as under *Great Dane*, even if the employer proves business justification, the Board may nevertheless find that the employer has committed an unfair labor practice if the conduct is demonstrated to be ''inherently destructive'' of important employee rights or motivated by antiunion intent.

The Clubs do not question the reasons why they withheld the wages. I conclude that the Clubs suspended payment of wages not only on the apparent basis of the strike but also on the actual occurrence of the strike in accordance with the Management Council's detailed strike contingency plan, which stated:

> Clubs should allow normal access to its facilities by players who choose to continue to practice and play for the team. Injured players should be permitted access to club facilities only so long as they follow club physicians' and trainers[']' rehabilitation instructions, attend team meetings at the direction of coaches, perform whatever on-field activities as their physical condition permits, and otherwise function at all times as non-striking members of the team. If any injured players engage in any picket line activity they may be presumed to be striking and treated as strikers.
>
> . . . .
>
> Strikers shall not be paid any portion of their salaries. This applies to all strikers whether active, injured reserve, or PUP. Medical treatment or rehabilitation for strikers shall be furnished only at an outside facility (e.g., the club physician's office) and no club trainers shall be involved in administering treatment or rehabilitation to strikers.

In response to questions asked by some of the Clubs, the Management Council sent another memorandum on September 18, which read, in part, as follows:

> 1. Injured players who are on strike shall not be paid any portion of their salaries. Injured players not on strike must continue to be paid their salaries. The problem may be to determine whether an injured player is on strike.
>
> 2. If an injured player engages in picketing or respects a picket line, he shall be considered a striker. In that case, medical treatment and rehabilitation shall be furnished only at outside facilities (e.g., the club physician's office) and not at the club facilities. If a player attempts to both picket and gain access to club facilities for rehab purposes, he should not be permitted to do so. A player is either on strike or not; he cannot be both a striker and a non-striking member of the team. The choice is his, but he must make the choice.
>
> 3. The determination of whether the injured player has chosen to be a non-striker shall be determined as follows: (a) he must not engage in picketing nor indicate by any actions or words that he is a striker; (b) he must strictly follow club doctors' and trainers' rehab instructions while utilizing club medical facilities; (c) he must strictly follows [sic] club doctors' and trainers' instructions as to performing whatever on-field activities his physical condition permits; (d) he must strictly follow coaches' directives as to attending team meetings and performing whatever on-field activities that are authorized by club physicians and trainers; and (e) he otherwise functions at all times both on and off club premises as a non-striking member of your team.
>
> 4. The above-stated guidelines apply to injured players whether they are on the Active List, Injured Reserve List or Physically Unable to Perform List at the time of the strike and thereafter.

As is shown below, these policies changed the status of some of the injured reserve players once the strike began. Some players who previously had not been required by their Clubs to attend meetings and practices suddenly were. Some players who were rehabilitating at home were required to re-

port to their team's facilities and to perform activities that they had not been asked to perform prior to the strike. These events occurred because the strike intervened, and the above-quoted measures and directives were effectuated because the Management Council required that the Clubs put them into effect. I conclude that the second part of the Board's *Texaco* test, that the benefits were withheld on the basis of the strike, has been met.

One further comment, however, is in order. The Clubs repeatedly contend in their brief, consistent with the above-quoted rules and instructions which partially premised a player's eligibility for weekly pay on his lack of sympathy with the strike, that certain players were strikers or indicated their sympathy with the strike and thus disqualified themselves from weekly pay. The difficulty with their argument is that the Management Council's instructions are legally misguided and flawed. In *Emerson Electric Co*., 246 NLRB 1143 (1979), the Board held that an employer may not presume that affirmative strike support justified the termination of existing disability benefits. An employee had an 8(a)(1) right, the Board explained, to refrain from declaring his position on the strike when he was medically excused. On the other hand, while disabled employees need not affirmatively disavow the strike action, they could not actively participate in the strike without running the risk of forfeiting their benefits prospectively. Thus, the Board concluded that once an employee displayed public support for the strike, such as joining the picket line, that would terminate his right to further benefits.

Under the Board's theory, some of the Management Council's instructions might have been valid. However, the Third Circuit modified *Emerson Electric* on enforcement in *E. L. Wiegrand Division v. NLRB*, 650 F.2d 463 (3d Cir. 1981), cert. denied 455 U.S. 939 (1982), and disagreed with the Board's rationale. The Board reconsidered its position the following year in *Conoco, Inc*., 265 NLRB 819 (1982), enfd. 740 F.2d 811 (10th Cir. 1984). There it held that an employer could not withhold a fully accrued benefit by showing that a disabled employee actively participated in strike activities. Evidence of his participation did not render the employee a striker if he was so disabled that he was unable to withhold his services from his employer in support of the labor dispute. *Texaco*, 285 NLRB at 244.

That rule has been consistently applied by the Board since then. *Conoco, Inc*., 287 NLRB 619 (1987); *Gulf Oil Co*., 290 NLRB 1158 (1988); *Texaco, Inc*., 291 NLRB 508 fn. 6 (1988). In *GHR Energy Corp*., 294 NLRB 1011 (1989), the Board found that the employer violated the Act by not paying his employees their accrued sick pay, even though the employees appeared on the picket line. In *Texaco*, 285 NLRB at 246 fn. 25, the Board reaffirmed that ''even specific evidence of a disabled employee's participation in strike activities is of limited relevance under the *Conoco/Great Dane* test. Such evidence may prove that a particular individual was no longer disabled.''

As a result, I reject the Clubs' position that various players' sympathy for the strike, or picketing or attendance at the picket line, or attendance at union meetings and union-sponsored practices, or maintaining contact with union leaders, or keeping track of the progress of the strike, requires that wages be withheld, especially because the Clubs do not claim that the evidence supplied proof that any player was no longer disabled and could have played football. *Helca Mining Co*., 286 NLRB 1391 fn. 2 (1987). Nor do the Clubs claim that any of their actions were taken to determine whether the players were no longer disabled so that they could have played football or could have engaged in a different form of rehabilitation. That determination would be relevant. Otherwise, Board law is clear that a disabled player cannot strike.

The Clubs' principal defense is that the payments due to the players on injured reserve are not accrued benefits and thus the first test of *Texaco* has not been met. Proof of accrual is critical, ''because otherwise there is no basis for finding that employee rights have been adversely affected, given that an employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services.'' *Gulf & Western Mfg. Co*., 286 NLRB 1122 (1987). The player contract, quoted above, the Clubs argue, is not written to compensate players for past performance but is ''designed to protect wages that employees would otherwise have earned,'' citing *Amoco Oil Co*., 286 NLRB 441 (1987). Furthermore, whether injured or not, and whether they can play or not, the players are obliged to perform additional functions at all times, to wit, to maintain their physical condition and to attend practices and team meetings, including film sessions. The General Counsel contends, to the contrary, that the benefit was accrued, that it was 'due and payable on the date on which the employer denied [it],''' *Texaco*, 285 NLRB at 245, that is, it was ''based on past performance [and required] no further work . . . for continuing receipt.'' Id. at 246.

The Clubs' reliance on *Amoco* is misplaced. There, the employer's benefit handbook noted certain situations in which disability payments would be discontinued, including periods when the employee would have been on a leave of absence, or on layoff, or on vacation, and that benefits would be resumed when the disabled employee was otherwise due to return to work. The Board concluded that ''work must be available in order for a disabled employee to be entitled to continued payment of disability benefits,'' citing *Amoco Oil Co*., 285 NLRB 918 (1987), and noted that this general requirement had been applied consistently by the employer on a corporatewide basis to various situations, including lockouts. Thus, the Board found that there were two requirements for eligibility: The employee had to be disabled *and* scheduled to work. The employer was entitled to discontinue disability payments for periods when there was no work available for the employee. *Conoco, Inc*., 287 NLRB at 621 fn. 9 (1987).

Unlike *Amoco*, the player contract provides for no situation requiring that payments be discontinued. Here, the benefit was payable because the player was injured and then placed on injured reserve. The benefit had vested. All the conditions necessary for the payment had happened: there was an injury while the player was performing his services under his player contract and a decision by the Club to place the player on injured reserve. The benefit was guaranteed. It was payable and continued to be payable because the player contract provided that the player would continue to receive his yearly salary so long as the player was unable to perform the service required of him. Because the player had been placed on injured reserve, the Club withdrew the player from

work; and he could not be scheduled for work, whether there was work or not.

The Clubs' reliance on an arbitration decision involving baseball is similarly misplaced.[36] There, the arbitrator held that the language in the player's contract, which provided that a disability ''shall not impair the right of the Player to receive his full salary for the period of such disability,'' meant that players were not entitled to be placed in a better economic position than healthy players. The arbitrator looked to the dictionary definition of ''impair'' and found that ''the critical factor would seem to be *harm to or reduction of* something that otherwise would have been present in full.'' By using the word ''impair,'' the intent was to protect whatever right to salary the player otherwise would have had. The loss of salary payments to the disabled baseball players ''simply was an inevitable consequence of the unavailability of salary to be protected against impairment.'' Thus, the arbitrator's decision is in accord with Amoco, which holds that the disabled player would have a right to his salary only when, if he were healthy, he would have been earning a salary but for the disability. Here, however, there is no similar qualification for the injured reserve player to receive his benefit.

Contrary to the contract in baseball, neither the football player's individual contract nor the collective-bargaining agreement have a similar concept of ''impairment,'' which the arbitrator expressly noted, was ''unusual contract language.'' This record also lacks the negotiating history pertaining to football's injured reserve provision, whereas the arbitrator in the baseball case had the benefit of the parties' thorough presentation of that issue. In addition to the arbitrator's decision being unique to baseball, the decision is readily distinguishable because he expressly reserved opinion about what his result would be if, as here, the season continued in spite of the strike. For these reasons, the award, which holds that the benefit in baseball is not an accrued benefit, is distinguishable on its facts.

Proof of accrual most often will turn on a case-by-case interpretation of the relevant collective-bargaining agreement, benefit plan, or past practice. *Texaco*, 285 NLRB at 246. The General Counsel's position is that, once the player is injured and placed on injured reserve, he does not need to perform further work to ensure the continuing receipt of wages. That is particularly true in two instances, the first occurring when a player dies. The player contract specifically provides that the remainder of the player's salary for the season of injury will be immediately paid to his beneficiary or his estate. Upon the player's death, there could no further requirement, such as rehabilitating or reporting to meetings, which the team could impose. The entire year's salary for that season is thus an accrued benefit.

The second instance involves an injury which is so serious that a player cannot do anything. If a player is injured, is hospitalized, and is expected to be and actually is immobilized for the remainder of the season, that individual cannot reasonably be expected to function as a football player; yet he is still guaranteed his pay for the year. Similarly, a player who is less severely injured, but still hospitalized for 4 weeks, is also guaranteed his pay for the period of his disability, including the 4 weeks during which he cannot, for example, attend practices or view game films. The benefit is accrued. The player has to do nothing more to ensure that his weekly check will be paid.

Three players in this proceeding were particularly severely injured (there were others), and the Clubs' brief is almost silent as to how to treat them, underscoring the difficulty of their position that these benefits had not accrued. The Clubs admit that James Demerritt, Tim Richardson, and Tim Wrightman ''were allowed by their respective clubs to rehabilitate at home prior to the strike, that they did nothing to indicate to their clubs that they were striking, but that they were not paid during the strike.'' Thus, the Clubs claim that these were nonstriking players who were not paid during the strike and that any relief to which they might be entitled should be pursued in a ''contract claim.'' In light of the common policy followed by all the Clubs pursuant to the Management Council's directives, I infer that the failure to pay these players was due to their failure to report to work during the strike and to declare that they were not strikers. In addition, the players' respective Clubs attempted to find out whether the players favored the strike and did not pay them because the Clubs thought that the players did. As I concluded above, this is an illegal reason for denying them their benefits.[37]

a. *James Demerritt*

Broncos player James Demerritt was injured on August 4 or 5 in London, England, in a practice for an exhibition game there on August 9. He suffered complete numbness and was unable to move for 2 to 3 minutes. About a week after the team returned to the United States, in a conference at the Broncos' training facility in Greeley, Colorado, the team doctor, James McElhinneh, said that his examination revealed that Demerritt had bruised his spinal cord and that he would be a high risk for being paralyzed if he were to receive another injury. He said that the Broncos would never allow Demerritt to pass a physical to play football again. The doctor recommended that Demerritt abstain from football and go home and lead a normal life. He left camp on Tuesday, August 25. He was placed on injured reserve after he incurred his injury and he remained on injured reserve for the entire season.

[36] The General Counsel moves that I reconsider my refusal to strike the award, which was attached to the Clubs' brief as an exhibit. Although one could argue that the award should have been offered in evidence during the hearing, as so many other awards were, I renew my view that I am willing to read any legal authority that the parties believe might aid in the resolution of the issues in this proceeding. I deny the motion.

[37] To the extent that the Clubs contend that the Board should defer these three claims or certain other issues to arbitration, I deny their motion. The major portion of this unfair labor practice proceeding is not subject to arbitration. The allegations which are arguably arbitrable are insignificant when compared to the reinstatement issue and most of the other unfair labor practices alleged in the complaint. Because the Board must determine a substantial part of the instant dispute, there is no compelling reason for deferring to arbitration a few of the less weighty portions of the complaint, all of which in any event are intertwined with the nondeferrable complaint allegations. *Heck's, Inc.*, 293 NLRB 1111 (1989), citing *S.Q.I. Roofing*, 271 NLRB 1 fn. 3 (1984); *Sheet Metal Workers Local 17 (George Koch Sons)*, 199 NLRB 166, 168 (1972), enfd. mem. 85 LRRM 2548 (1st Cir. 1973).

Demerritt did not return to Denver until after the end of the strike and had no conversation with any representatives or officials of the Broncos between the end of August and the end of the strike. When Demerritt was not paid by the Broncos during the strike, his agent wrote to complain. The Broncos replied that they wanted a letter stating that, if Demerritt were eligible to play, he would have played during the strike. Despite the fact that Demerritt sent such a letter on October 30, he was not paid for the canceled game.

The Broncos' request for Demerritt's letter was a blatant attempt to ascertain Demerritt's position on the strike. Even his favorable response was irrelevant to his entitlement to benefits. His benefit was fully accrued. There was nothing that he had to do that could have made his benefit any more accrued than it was. In fact, the Broncos never even asked him to perform any football-related functions. To the contrary, the Broncos told him that he would never pass a football physical and that he was to abstain from football. I conclude that the Broncos violated Section 8(a)(3) and (1) of the Act by not paying Demerritt for the canceled game.

b. *Timothy Richardson*

Timothy Richardson, a Giants' running back, dislocated his right patella during training camp on July 31. His knee was realigned at a hospital and he returned to training camp 2 days later to start his rehabilitation. After a month, the team orthopedic surgeon, Russell Warren, and head athletic trainer Ronnie Barnes agreed that it would be best for Richardson to have surgery on his knee so that it would not slip out anymore. He underwent surgery on September 1 and was released from the hospital on September 5. He then returned to the Giants' training camp and conferred with Barnes, who said that this type of knee surgery barred any rehabilitation for 5 or 6 to 7 weeks.

Although the recollections of Barnes and Richardson differ in numerous respects, there is no dispute that Richardson was told that he could go to his home in Illinois or to California, that the Giants provided Richardson with an airplane ticket to his home in Illinois, that he left the New York area on September 7 or 8, and that he did not return to Giants Stadium until after the strike was over. There is similarly no dispute that Richardson was in a cast brace immobilizer, that he could not move his leg, that there was no rehabilitation that he could have reasonably engaged in, and that he could not play for the entire season. He was one of those injured players for whom participation in team meetings and film sessions would have made no sense, because there was no expectation that he would rejoin the team for the remainder of the season.

According to Richardson, his next contact with the Giants occurred about 3 weeks later. Then he called Barnes and asked how everything was. Barnes said that everything was hectic because the strike had been going on for a week. Barnes asked Richardson how his leg was doing, and Richardson said fine. Barnes told Richardson to sit back and relax and not worry about anything because it was too hectic at the stadium to do anything. Barnes asked Richardson to call back in 3 or 4 weeks or after the strike was over. Three weeks later, after the strike had ended, Richardson again called Barnes and told him that his leg felt better and he wanted to start some type of rehabilitation. Richardson testified that Barnes wanted him to start his rehabilitation in California or Illinois because Head Coach Bill Parcells did not want any injured reserve players in rehabilitation at Giants Stadium. Barnes denied that he would have made any statement about Parcells not wanting a player to rehabilitate at the Club's facility. In any event, Richardson said that he had planned to return to New Jersey and he wanted to rehabilitate there, and Barnes permitted Richardson to go, at the Giants' expense, to the Meadowlands Professional Sports Care, which Barnes partly owned.

Richardson started his rehabilitation there on October 23 and continued until March 1988. He was first placed on injured reserve on September 1 and never attended practices, team meetings, film sessions, or anything else at Giants Stadium from that day forward. Like most of the other injured reserve players, he was not paid for the canceled game and the three replacement games. He first found out that he would not be paid when Barnes gave him a letter saying as much on December 23. Richardson complained that he could not see why he would not be paid when Barnes had told him to stay away for 5 to 7 weeks. Richardson testified that Barnes agreed but said that he could do nothing.

The Clubs' brief, by its failure to deal with this allegation, essentially concedes that there is no defense to the failure to pay Richardson for the four games, and I conclude independently that there is no defense. Richardson was incapable of doing anything that might be meaningful to the Giants, who placed Richardson on injured reserve and kept him there, and who required nothing of him to recuperate or to receive his benefit. The critical event occurred when he was injured and when the Giants guaranteed his salary payments. The General Counsel properly contends that this was an accrued benefit. I conclude that the Giants violated the Act by not paying him for the canceled and the three replacement games.

c. *Timothy Wrightman*

Timothy Wrightman, a tight end for the Bears, was on injured reserve for the entire 1987 season, having had knee surgery on September 3 in California to repair torn ligaments and cartilage. Released from the hospital on September 6, he returned to Chicago and began limited rehabilitation at the team's facility on Wednesday, September 9. Among the exercises that he concentrated on were those to extend and flex his knee, in other words, to build the range of motion of his leg, which for the rest of each day was kept in a nonweight bearing removable brace with metal rods on the side, which could be adjusted so that the knee could be bent.

Wrightman continued with his exercise program on Friday, September 11. Later that afternoon, he called his tight end coach, Steve Kazor, to say that he was having a ''very rough time''—he was still on crutches, was still wearing a nonweight bearing cast, was living alone, was having a difficult time going to the bathroom and cooking, and was having food brought in because he could not drive—and wanted Kazor to ask Head Coach Mike Ditka if he could go to his home in California until he could take care of himself. Kazor called back an hour later with Ditka's approval. Wrightman returned to Chicago on October 1 or 2, where he stayed for less than a week, and returned again on October 20. He reported to the Bears' facility on October 21, still on crutches and still wearing a nonweight bearing cast. When Wrightman was paid in 1988 (his 1987 salary was contractually deferred), he was paid for only 12 games.

The Bears' defense at the hearing was based solely on the testimony of head athletic trainer Fred Caito, who said that he had been directed by the president of the team to advise all players that, if they went on strike, they were to get their treatments and rehabilitation at the clinic of the team's orthopedic surgeon, Dr. Clarence Fossier. Only if they were not going on strike could they continue to come to the Bears' facility. Caito testified that he followed these directions. However, he conceded on cross-examination that he never talked to Wrightman. He did not know where Wrightman was and he never heard from him during the strike.

In these circumstances, I conclude that Wrightman's benefit had accrued. When he was injured, the Bears placed him on the injured reserve list with the knowledge that he would be unable to play for the entire season. When Wrightman was unable to function on his own in Chicago, the Bears permitted him to go to California and paid for his air fare. There was nothing further that the Bears required of Wrightman for him to be eligible to receive his weekly pay. That benefit was withheld from him solely because of the occurrence of the strike. The Bears failed to show any substantial and legitimate business justification for not paying Wrightman. I conclude that the Bears violated the Act.

These three players were so severely injured that, when their injuries occurred, their respective Clubs were aware that they would not be able to perform any meaningful football-related function in the foreseeable future. They had been placed on the injured reserve list, and there was nothing further that their Clubs required of them in order to ensure that their salaries would be paid. Their benefits had accrued. Some, but not all, closer cases follow,[38] which involve injured reserve players who were not as severely injured as these three or who had already begun their rehabilitation when the strike began. Some were able to engage in a little exercise, running or lifting weights, using muscles unaffected by their injuries; some had begun rehabilitation; some attended team meetings and practices.

The Clubs argue that these functions are part of the player's duties even while injured. The player contract, they contend, requires all players to maintain themselves in excellent physical condition, and the collective-bargaining agreement requires the players to do all that the Clubs ask of them, specifically including the requirement to attend practices. The Clubs argue correctly that they depend on players of quality to play in the games and are interested in their earliest possible recovery. If the players are good players, the Clubs are anxious for their early return because they are the players who made the teams, and they were selected because they were the best available. The teams would prefer to have their best players on the field, not those who were second-best.

The desire that the injured players rehabilitate themselves as quickly as possible is not based solely on producing a winning team. As found above, the player's average salary is $15,000 for each game. Many receive much more. The Clubs naturally want to save that money, if they can, and not spend the money for a high-priced player who is not performing. Conversely, if players are not deemed to be good enough to help the teams, the Clubs nonetheless want them to recover at an earliest date so that the Clubs can release them and no longer be responsible for their wages.

The player contract commits players to maintain their physical condition, and the Clubs submitted numerous awards of arbitrators who held that certain players were not entitled to all their wages because the players had not participated fully in all programs established by the Clubs to rehabilitate them. Any other interpretation would permit a player to sit back and collect a guaranteed minimum of a year's salary without moving a muscle, even though with cooperation the player could have been fully rehabilitated in a month. The players must, therefore, rehabilitate with as much cooperation as possible to minimize the Clubs' costs. It is that cooperation which, the Clubs contend, removes the wage benefit from the category of accrued benefits, by the Board's own definition in *Texaco*, because the player is required to perform further work for continuing receipt of his game wages.

However, a Club's obligation to pay wages to its injured player arises not as a result of his compliance with his duty to rehabilitate but as a result of the fact that he has been so seriously injured that his Club has decided to place him on injured reserve and thus not to play him for at least four games. The moment his name is on the injured reserve list, he becomes entitled to be paid for those four games and, as an injured reserve player, he continues to be guaranteed his pay for all games until his Club activates him. Thus, it is the serious injury and the Club's subsequent placement of the player on the injured reserve list that cause the guarantee, and the player is entitled to his wages because he is injured so seriously that he is placed on the injured reserve list, and for no other reason. In cases of death and such serious injuries suffered by Demerritt, Richardson, and Wrightman, the player has to do nothing more to be entitled to his pay. For those players, the benefit has accrued.[39]

There is no valid reason why the benefit should be any less accrued for those players for whom there is a hope of more immediate recovery. The Clubs considered their injuries serious enough that they were willing to forfeit their players' services for at least four games and, once they placed the players on injured reserve, they knew that they immediately guaranteed the players' pay for four games. Assuming, as is the case with a number of the players involved in this proceeding, that a player was disabled for a week after being placed on injured reserve and could do nothing, and that player did not do anything, his benefit is clearly accrued. If he recovered sufficiently so that he were able to start some rehabilitation, I see no valid reason why his benefit should change from one that is accrued to one that is not. Rather, the continuation of the benefit is in the player's hands. If he were required in the course of his rehabilitation to perform certain tasks, and he did not, he would be subject to losing his benefit and having his accrued right defeased. *Amoco Oil Co.*, 285 NLRB 918, 919–920 fn. 9 (1987).

I am less inclined to agree with the principle that a player's failure to practice or attend film sessions results in the same defeasance. No arbitration award submitted by the Clubs supported that proposition, which does not make that

[38] The counsel for the General Counsel moved for an order permitting him to withdraw the claim of Mark Behning, which I granted on December 11, 1989.

[39] The Clubs contend that this test is based on the severity of the injury, but it is not. The accrued nature of the benefit is merely more apparent when one considers the more serious injury.

much sense in any event. After all, the players are paid to play football games, and not to engage in practices. Practices are important only as far as they prepare the players for the football games. The networks pay to televise games, not to air practices and team meetings. Fans pay money to see games and, except for those true fanatics and for the merely curious, do not pay to see players practice.

Players' wages are structured in terms of the games played. The players are paid a scale for their participation in preseason training camp. When the regular season begins and a player misses a practice without excuse, he is typically fined an amount which is wholly unrelated to the amount of his wages. The player contract requires, unless otherwise agreed to, that players will be paid their yearly salary in equal weekly or biweekly installments over the course of the regular season, starting with the first regular season game. No one testified that a player who missed all the practices during a week but still played in the game that weekend was docked for missing practices or team meetings, or that a player who was traded on a Thursday and reported to his new team on Friday was not entitled to his full game's pay by his new team if he was activated for that weekend's game. Thus, the contract and the actual practice of the Clubs demonstrate that a player's failure to engage in any function other than rehabilitation would not result in the loss of the injured reserve benefit.

I now review the facts regarding the remaining injured reserve players, with particular emphasis on the nature of their injuries, whether they were required to perform certain tasks in furtherance of their rehabilitation,[40] or whether their Clubs required them to do something different, because of the strike, which would be just as much a violation of the Act as a violation under the *Great Dane–Texaco* rationale.

d. *Bears*

(1) Lew Barnes

Lew Barnes, a Bears' punt returner and wide receiver, fractured his fibula and ankle and tore ligaments in his ankle during practice in training camp and underwent surgery on August 26. Dr. Fossier, the team's orthopedic surgeon, told Barnes upon his release from the hospital in early September that he would not be playing that season and that he was to take 4 to 6 weeks off and come back and get ready for therapy. Barnes testified that he went from the hospital to the Bears' facility, where he met with trainer Caito, who mentioned the same recovery period as the doctor and gave Barnes permission to return to his home in San Diego, California. The team paid for his round-trip ticket, which had a return date of October 1.[41]

Dr. Fossier instructed Barnes to have the Chargers' team doctor take X-rays when Barnes arrived in San Diego. Instead, Barnes' agent suggested that he see Dr. Richard Richly, who wanted to start Barnes on rehabilitation. Barnes checked with Caito, who in mid-September approved of all but one of the therapies that Richly had suggested. On or about October 8, 9, or 10, Barnes called Caito to complain that he had not been receiving his game checks. Caito said that the players who were on injured reserve that were receiving therapy at the Bears' facility were considered nonstrikers; but those who were receiving therapy at all other facilities were considered strikers. Barnes asked how that applied to him because he had been receiving therapy elsewhere even before the strike started. Caito did not respond except to say that, if Barnes did not return to Chicago to receive therapy at the Bears' facility or otherwise did not cross the picket line, he would be considered a striker.[42] Barnes said that he was receiving therapy in San Diego before the strike, that he would continue to receive therapy there, and that he wanted to finish his therapy there.

Barnes admitted in his prehearing investigatory affidavit: ''I did not return to the Bears' facility on October 1, and I decided to stay in San Diego because I knew the strike was still going on and I just did not want to deal with it, so I remained in San Diego and continued my treatments.'' Barnes' excuse, that he did not want to ''deal'' with the strike, was insufficient. He was required to do, within legal limits, what the Bears required of him; and I find that the Bears' request for his return was not discriminatory and his failure to return was sufficient to justify the Bears' refusal to pay him after October 1. Barnes admitted that he was to return to start his therapy.

However, his failure to return was not the Bears' reason for refusing to pay him for the canceled game. From Caito's testimony, it is evident that once Barnes did not report to the Bears' facility at the beginning of the strike, the Bears considered that he was a striker and not entitled to be paid. When Barnes called in the second week of October to complain that he had not been paid, Caito answered, as other Clubs seem to have replied to other players, consistent with the strike contingency plans and the above-quoted questions and answers, that Barnes was a striker because he had not come to the Bears' facility. Because Barnes persisted with the treatment program that he was receiving before the strike, which had been approved by the Bears, the Club was not entitled to make any presumption that Barnes was a striker at the beginning of the strike. His benefit had accrued and, under *Texaco*, could not be taken away; but Barnes' failure to return on October 1 sustains a finding that his benefits should defease. I find a violation only to the extent of one game's pay for the canceled game. Barnes testified that he returned to Chicago on October 14, but he never offered to return to the Club before the last replacement game and he offered no reason for his failure to report with all the other Bears' players. He is therefore not entitled to be paid for the last replacement game.

[40] In addition, it is important to note that the injured reserve players may not have gone to their teams' training rooms to obtain the treatment necessary for their rehabilitation, but they did follow their Clubs' advice about alternative treatment. In other words, for the most part, the Clubs seek to avoid the responsibility for paying the players despite the fact that the players were following their Clubs' orders for obtaining medical help, albeit at a different location.

[41] Barnes said the date was inserted only to make it a valid round trip ticket. However, the ticket could have been issued with an ''open'' return. Furthermore, Barnes admitted that Caito told him to return to the Bears' facility around October 1.

[42] Caito's attempt later in his testimony to deny that this is what he said is unbelievable. His earlier testimony demonstrated that this was his understanding of which players would be considered strikers and which ones would not. Furthermore, it is consistent with the Management Council's memoranda quoted above.

(2) Steve Fuller

Steve Fuller, a quarterback for the Bears, had surgery on his right shoulder (his throwing arm) on August 19. He was placed on PUP status and the prognosis was that he would not be able to competitively participate in practice (meaning put pads on, throw the football, and participate in drills) for 12 to 16 weeks. After his surgery, he recuperated at home for a week or more and then came to the team's facility once or twice a week to change his dressing or to chat with other players. Until the Bears' first game on Monday night, September 14, he attended one or two team meetings. There was no evidence that he had been required to attend these meetings or required to have his dressing changed at the Bears' facility. Following the first game, he came in daily, but his rehabilitation was limited to taking a whirlpool bath and doing an exercise intended to increase the flexibility of the shoulder joint. During the first week, he attended two or three team meetings, but no film sessions.

By Sunday, before the second game, Fuller was able to stretch his arm above his head; and he met with Caito and Drs. Fossier and Berna, another of the team's doctors, to determine what should be the next step in his rehabilitation. Fuller testified that Berna did not want him to engage in any heavy weight lifting resistance until he had full range of motion in his shoulder. Berna showed Fuller the kinds of exercises he should do in the next few weeks, and Caito suggested and then told Fuller that his rehabilitation should take place at Dr. Fossier's clinic and that Mike, who was a registered physical therapist and one of the Bears' trainers who worked on game days, should do the rehabilitation. The doctors agreed. At no time was Fuller advised that he was to report to the Bears' facility for rehabilitation or treatment or to attend meetings or film sessions, if he were to be paid during the strike.

On Monday, September 21, Fuller began his rehabilitation at Dr. Fossier's clinic, and his rehabilitation continued there for 7 weeks. For the first 5 weeks, Fuller attended the clinic 5 days a week; for the next 2 weeks, 3 days. His sessions lasted from 2 to 2-1/2 hours and were scheduled according to Mike's availability. Once during both the second and third weeks of the strike, Fuller visited the Bears' facility to pick up his mail and messages. The next week, on October 15, he attended the team meeting called by Mike Singletary, the players' union representative, with representatives of the team, where the players offered to return to work. Later, he saw Caito, who said that he thought that Fuller was progressing well and that he should be able to start lifting weights very soon. However, Caito advised him to continue to keep his appointments at the clinic.

The following Monday, October 19, after the end of the strike, Fuller reported to the Bears' facility and began doing weight lifting under the directions of Clyde Emrick, the Bears' weight and conditioning coach, about three times each week for the first 2 weeks. At the same time, he kept his appointments at the clinic (then 5 days a week; the following 2 weeks, 3 days a week), and Caito reemphasized that Fuller not only was to do his weight lifting at the Bears' facility but also was to keep his appointments at the clinic. From October 19 to the end of his treatments at Dr. Fossier's clinic, Fuller attended about half of the team's meeting and film sessions. Fuller testified that he had never been told that he had to do anything more to be paid for the canceled and three replacement games. He was not, however, paid for those games.

The Bears' defense is based wholly on the testimony of Caito, who said that he had been directed by the Bears' president to advise all players that, if they went on strike, they were to get their treatments and rehabilitation at Dr. Fossier's clinic. Only if they were not going on strike could they continue to come to the Bears' facility. Caito stated early in his testimony that he followed these directions. However, as noted above, he later admitted that he never talked to Wrightman. Furthermore, Caito said that he did not talk to Barnes before the strike, but gave him the instructions only when Barnes telephoned from San Diego. Caito said that he first talked with Fuller on the Sunday before the strike, and what he told Fuller was exactly what he had been instructed to tell him, that is, if he went on strike, that he should go to Dr. Fossier's clinic. Contrary to Fuller, he said that Fuller was scheduled to attend, and did attend, the team meeting each day.

Fuller was very bright, intelligent, and completely sincere and dedicated. I find no persuasive reason to find his recall suspect, and the fact that neither of the two doctors testified leads me to believe that they would not have faulted Fuller's recall of the instructions given to him on the Sunday before the strike. In light of Caito's original broad testimony that he talked with each and every one of the injured reserve players before the strike was called, and his subsequent admission that he did not talk to Wrightman at all and talked to Barnes only when he called in several weeks after the strike began, I find that he inflated his testimony to benefit the Club. He was too quick to testify in favor of his Club's position, despite the fact that he must have known which players were claimants in this proceeding. His failure to limit his broad testimony leads me to conclude that he should not be believed, and I credit Fuller. I find, therefore, that Fuller was not required to report to the Bears' facility during the strike but, instead, that he carried out precisely the instructions given to him by his team.

That makes considerable sense in light of the extent of Fuller's injury and the fact that the Bears did not have the most sophisticated training room equipment which normally would be used for the rehabilitation of such an injury. It is likely that Caito said, as Fuller testified, that he would be better served by rehabilitating at Dr. Fossier's fully equipped clinic with a trainer who had ample time to spend with Fuller. This conclusion is further supported by the fact that Fuller continued to rehabilitate at the clinic even after the strike had ended, although he started to do weight lifting at the Bears' facility on the Monday after the strike ended. Even then, Fuller did his lifting only 3 days a week, 2 days less than what Caito said Fuller was ready to do almost a month before. (Caito testified that, as of September 21, Fuller would have been in the late stages of his range of motion work and early stages of light resistance work, which would have required him to rehabilitate at the Bears' facility 5 days of work.) It seems obvious that, but for the strike, Fuller would have rehabilitated at the clinic, which was equipped to perform the rehabilitation. I find it unlikely that Caito would have told him to do anything else.

In addition, the testimony of Bears' treasurer Ted Phillips indicates that the team was concerned not so much with Fuller's return to actual duty as it was with Fuller's mere

declaration that he was not on strike. When Fuller complained that the Bears had no reason to deny him his game checks because he was doing everything that he had been requested to do, Phillips replied that Fuller should have called the team and said that he was not on strike. I conclude that Fuller was being discriminated against because he did not make that declaration.[43] Accordingly, the Bears' failure to pay Fuller for the canceled game and the three games played during the strike violated Section 8(a)(1) and (3) of the Act.

e. *Albert Bell*

Albert Bell, a rookie wide receiver for the Browns, broke a bone in his left hand during training camp on August 25. His finger was stitched and cast in a splint at the Cleveland Clinic by Dr. Tom Anderson, the Browns' associate team physician and an orthopedist. Bell then returned to the team's facility, and Bill Tessendorf, the team's head athletic trainer, told Bell that there was no treatment that he could engage in. He was merely to keep the wound clean. In the meantime, Bell would be placed on injured reserve.

According to Tessendorf, all injured reserve players are required to report to the Browns' facility every day but Sunday, and he or the team doctor or both advised Bell to report to have his wound cleaned three times a day, sometimes under the supervision of one of the trainers. From then until the beginning of the strike, Bell reported to the Browns' facility almost every normal practice day (Tuesday was an off day and Bell had no transportation except with an active player) and, like all other players, attended team meetings and film sessions, and later practices, although he only watched. He also soaked his finger in a solution of hydrogen peroxide two or three times a day, at least once at the Browns' facility, and did some conditioning, such as running and riding a stationary bike. On September 6, the team physician, Dr. John Bergfeld, revised the treatment to a dry dressing, to be changed three times each day. Because there was a concern of potential infection, Bergfeld instructed the trainers to watch over Bell and look for any change in the nature of the wound's discharge. As a result, Bell was under the constant care of the Browns' personnel. By this time, Bell had also started some weight lifting.

The day before the strike, Head Coach Marty Schottenheimer advised his players at a team meeting that there was a great possibility that there was going to be a strike and that everyone should remain strong and ''to stay as a team and do everything together.'' Once the strike began, Bell did not report to the Browns' facility. He continued to clean his finger, but only at home. Within the week after the strike began, on September 28, Dr. Bergfeld advised him to go to the hospital. X-rays showed that he had an infection on the bone and this was treated, first, by antibiotics intravenously, and, second, by surgery, after which the intravenous treatment continued. Bell was hospitalized for approximately 4 weeks and was released on or about October 20. After that, Bell returned to the Browns' facility, where he cleaned his finger twice a day, two or three times a week. Bell continued to be on injured reserve for the entire season.

Bell was paid only 12 game checks, none for the canceled game or the three strike replacement games. He testified that he had never told anyone that he was on strike, he was never told to report to the Browns' facility during the strike, and he was never told what he had to do in order to be paid during the strike. Tessendorf's testimony was completely to the contrary. He said that he received from his management a detailed list of instructions for employees' responsibilities if there were to be a strike. He was to tell the injured reserve players that, if they were not going to strike, he could continue to provide treatment and rehabilitation in the team's facilities. If they were to strike, however, he could not treat them and the players could not use the team's facilities. Those that crossed the picket line and reported to the facility would be paid, so long as they participated in either rehabilitation or practice. If they did not cross the picket line, they would not be paid.

Tessendorf testified that he told Bell that, if he wanted to cross the picket line and not honor the strike, he could come into the Browns' facility, be treated and work out there, and be paid.[44] He specifically told Bell on September 21 that, if he were going to honor the picket line, it was important for him to keep in contact with the training room, because he had a wound which still had a chance of infection. He needed to continue his medical treatment, and he needed to keep his wound clean. Tessendorf gave him additional supplies to dress the wound and told him that he had scheduled appointments with the Browns' physicians that he had to keep. Bell called only once during the strike, asking Tessendorf when he could get out of the hospital. Tessendorf replied that Bell needed to remain in the hospital to receive his intravenous treatment.

Until the beginning of the strike Bell had reported to the Browns' facility, received his treatments, and attended team meetings and film sessions. He was told that he would have to continue to report to the facility during the strike in order to qualify for benefits, and that involved no change from what Bell had previously done. Bell decided to strike and not rehabilitate as he had done before. He is not entitled to receive his pay for the canceled game.[45]

When Bell's wound became infected, he was on strike, but he was still on injured reserve, too. His hospitalization changed his status. He was no longer able to strike, because he could not report to the Browns' facility and attend meetings as of September 28. Therefore, although his accrued benefit had defeased by reason of his failure to rehabilitate himself at the Browns' facility once the strike began, with his hospitalization, there was no activity that he could have physically engaged in and did not, which would have caused a loss of his benefits.

In so finding, I reject the claim that Bell could have received intravenous feeding of antibiotics at the Browns' training facility. Even if I credited Tessendorf that he had the ability to perform such a technique, Bell received treatments in the hospital 24 hours a day. There was not a hint that the athletic trainers were prepared to do this around the clock.

[43] My conclusion about Barnes is essentially the same. The Bears considered him a striker because he was still in California and had not declared that he was not on strike.

[44] There were about six Browns' players on injured reserve who crossed the picket line and continued to receive treatment.

[45] I reject the General Counsel's new claim in his brief that Tessendorf admitted on cross-examination that he told Bell to resign from the Union in order to get paid. It was not testified to by Bell, and Tessendorf's testimony is unclear.

Rather, Tessendorf told Bell during his hospitalization that he could not leave the hospital because he needed to remain on intravenous medication and Dr. Bergfeld felt uncomfortable releasing Bell to home care and antibiotic therapy. Furthermore, Tessendorf had never administered this type of treatment before. Finally, the Browns' physician sent Bell to the hospital. He never offered him the alternative of reporting to the training facility.[46] In light of the obvious seriousness of Bell's condition, I am not inclined to accept Tessendorf's testimony that his training room was in any way a substitute for a hospital, where this possibly ''fatal'' condition, according to Tessendorf, could be treated.

Accordingly, I find that Bell was entitled to be paid for the three replacement games.

f. *Derrick Crawford*

Derrick Crawford, a wide receiver for the 49ers', was on injured reserve status for the entire 1987 regular season. On July 21, the first day of training camp, he fractured his fifth metatarsal bone in his left foot. He required surgery on August 1, in which Dr. Michael Dillingham, the team orthopedic surgeon, inserted a screw in Crawford's foot to keep the bone together. Two or three days after his surgery, he was released from the hospital; and the 49ers paid for his air transportation to return to his home in Memphis, Tennessee. There, he went to Dr. Cyst, an orthopedic surgeon who had treated him before and who removed his stitches and performed some rehabilitation. Crawford gave all bills he received from Cyst to Lindsey McLean, the 49ers' head athletic trainer. Crawford was never rebilled for Cyst's services, and I infer that the 49ers paid Cyst.

Crawford talked several times with McLean, and McLean made arrangements in early September for Crawford to be examined by an NFL neutral physician[47] in California. He traveled to California and returned home on September 18, the Friday between the first and second regular season games. The 49ers paid for his ticket. During this visit, Crawford also saw Dr. Dillingham, who examined him briefly and said that he wanted to see Crawford again in 2 weeks.

Crawford testified that, while he was home, he talked with McLean and said that he saw no need to return to California because Cyst was an orthopedic surgeon and was doing a good job and that McLean agreed that it was unnecessary for Crawford to return. McLean's testimony was entirely different. On September 22 he called Crawford to tell him that he was calling on behalf of the 49ers' general manager, who instructed him to check with all the players on the injured reserve list to see if they were or were not participating in the strike. Crawford said that he was on strike with the rest of the players. McLean told him that he was scheduled to be reexamined in San Francisco in 2 weeks. He was allowed to see the team physician but he was not allowed to see McLean or receive treatment at the facility. He asked what Crawford's plans were, and Crawford said that, since he was in Memphis, he would prefer to see his local orthopedist, rather than return to San Francisco.

The 49ers had paid Crawford weekly since he was injured. While he was recuperating at home, he was paid his weekly training camp compensation. Once the season began he was paid weekly his regular game check for the first two games. However, with the beginning of the strike, the checks stopped. Between the second and third replacement games, Crawford telephoned John McVay, the 49ers vice president and general manager, to ask why he was not being paid. McVay replied that, in order for Crawford to get paid, he would have to come to San Francisco, cross the picket line, and get treatment for his foot in the 49ers' treatment room. Crawford said that he was already home when the strike started and asked why he had to return. McVay restated that Crawford would have to get his therapy in San Francisco to be paid and that, since he was home, he was considered to be on strike. Crawford argued that he was already home before the strike began. Crawford was not paid for the strike-canceled game or any of the replacement games. He returned to San Francisco on October 20 pursuant to McLean's request 3 days before.

Although McLean kept meticulous records, and he had no record of the fact that he called Crawford on September 22, I credit McLean's recollection of his telephone call with Crawford. McLean said that he did so pursuant to McVay's instructions that the 49ers had to determine who was and who was not on strike so that it could advise the NFL. I found Crawford's recollections of his telephone conversations very hazy and imprecise and, in some instances, inconsistent and contradictory. Although Crawford was not asked and, therefore, did not directly deny the essence of McLean's testimony, I see no reason why, in any circumstance, McLean would not have been interested in the well-being of the players and particularly no reason why he would have overruled the team's doctor, who, his notes indicated, wanted to see Crawford on or about October 1.

Therefore, Crawford had the duty to rehabilitate himself and, by not returning to San Francisco to see the doctor, he did not comply with what the 49ers required of him. From that point until he made himself available to do what he was required to do under the collective-bargaining agreement, he might well have lost his entitlement to benefits. The doctor might have found that Crawford was well enough to begin a rehabilitation program at the 49ers' facility, and Crawford would have been required to pursue that program. However, until the time that Crawford failed in his responsibility, Crawford would have been entitled to be paid his game pay, so he is certainly entitled to be paid for the canceled game.

Under these facts, however, he is also entitled to be paid for the three other games. The uncontradicted conversation between Crawford and McVay reveals that Crawford's failure to return to San Francisco for his appointment with Dr. Dillingham was not the reason why Crawford was not paid. McVay stated that Crawford was not paid because he was at home and not in San Francisco, that he had not crossed the picket line, and that he had not received his therapy in the training room, behind the picket line. Because of these rea-

[46] Tessendorf testified that, if Bell had indicated that he was going to cross the picket line, he probably would have been paid even though he was in the hospital but, to be paid, he probably would have had to notify the Club that he was not on strike. This testimony clearly reflects the importance that Tessendorf attached to Bell's sympathies for the strike, rather than Bell's actual service to the Club.

[47] Such an examination is requested by the NFL to determine whether the player on injured reserve status has a legitimate injury or if the team is stockpiling the player for the purpose of maintaining control over more players than League policies permit.

sons, not his failure to see Dr. Dillingham, the 49ers considered that he was on strike.

As should now be abundantly evident, these are not valid reasons to deny a player his accrued benefit. Crawford had done nothing less than what he had done before. McVay imposed new conditions on him only because of the strike, and not because of his belief that Crawford was able to perform any meaningful service under his contract or that the team's doctor would have found that he could do more than merely stay at home. For this reason, the Club's reliance on *Texaco, Inc*., 179 NLRB 989, 993-994 (1969); *Texaco, Inc*., 291 NLRB 508 (1988); and *Texaco, Inc*., 291 NLRB 525 (1988), is unpersuasive. A strike does not permit an employer to change an employee's terms and conditions of employment without reason. When strikes were called in the three cited decisions, the employer demonstrated that its change of vacation schedules was justified by the business necessity of attempting to continue its operation and get its work out. There was also adequate contractual language which permitted the employer to make the changes. Here, the Club's action was taken solely to penalize the player for his Union and protected and concerted activities and for no justifiable reason. *John Dory Boat Works*, 229 NLRB 844, 849–850 (1977); *Reeves Bros., Inc*., 207 NLRB 51 (1973).

Again, the Club might have had a valid defense if it had acted because of the missed doctor's appointment, but even that reason pales in consideration of the record's demonstration that players often missed doctor's appointments without fine, certainly not the loss of three games' pay, which for Crawford was more than $30,000. Accordingly, I find a violation of the Act.

g. *Eagles*

(1) Brad Booth

Brad Booth was a free agent defensive back and special teams player for the Eagles. On August 12, during training camp, he suffered a hairline fracture of his left thumb which did not improve despite therapy and decreased activities. His thumb was X-rayed again on August 18 and his hand was placed in a fiberglass cast. He continued to do stretching exercises and to watch practice, but he engaged in no contact drills. Booth was one of the players in this proceeding for whom his team saw no indication that he would be able to contribute to the team's success. Indeed, in a summary of Booth's condition, the team noted that he would be on injured reserve for several weeks and would undergo minor therapy to regain his range of motion. Then he would ''be released from the ball club. He has no chance of making the ball club. It is an injury that will resolve itself through rest . . . .'' The cast was removed on September 17 by team doctor, Vincent DiStefano, and from then until the strike Booth reported daily to Veterans Stadium for therapy and was given hot and cold whirlpool treatments, electronic stimulation, and massage. He also continued to stretch and watch practice, but otherwise did not engage in any contact.

On Tuesday, September 22, the first day of the strike, Booth reported to the training room and saw a notice on the blackboard that a team meeting was scheduled for 9 a.m. Coach Buddy Ryan presided and said that he did not know whether there was going to be a strike or not, but his gut feeling was that there was. He wanted the team to either strike or not strike, and to do it as a team. If the team did strike, he wanted the players to stay in touch with one another as a team and to stay in shape and, depending on the length of the strike, to conduct some practices.

Later, Booth was told that Otho Davis, the team's head athletic trainer, wanted to see him and the other injured reserve players. Booth and Davis talked alone. According to Booth, Davis said that the stadium facilities and the training room would not be available to Booth for treatment. He recommended that, during the period of the strike, Booth should go for treatment to Paoli Medical Center, which is about 50 minutes away from the Stadium. Booth asked whether there would be any problem if he went home to Los Angeles, because he could get the same treatment there. Davis recommended that Booth go to Paoli. Booth then went back to his locker, cleared out his personal belongings, and left the facility. The following day, he went home, where he received the same kind of therapy that had been recommended by Davis.

However, he continued to have pain in his thumb; and the head trainer at the University of Southern California recommended that he see that team's doctor, Richard Diehl, who thought that the cast had been prematurely removed. Booth was placed in a cast again, this time a slightly larger one, which he was told to wear for 4 to 6 weeks. He returned to Philadelphia on October 14, because he had heard rumors that the strike was about to end, and attempted, unsuccessfully, to report to the facility on Thursday, October 15, with the other players. He finally returned the following Monday, October 19, when all the other players were permitted to report.

Booth had asked Dr. Diehl to tell the Eagles about the new cast, and, when Booth returned to the Club, he was still wearing the cast. Booth assumed that Davis had been told by Diehl, because Davis said nothing to Booth about the new cast, despite the facts that Booth continued to wear it for the next 3-1/2 weeks and engaged in no therapy. In addition, when Booth received a bill from Diehl, he gave it to one of the team's secretaries, who said that Diehl should call the Club and direct his bill there. Booth never paid that bill, and I infer that the Eagles did.

(2) Nick Haden

Nick Haden, an offensive center and guard for the Eagles, dislocated his left ankle and fractured his left fibula during training camp drills on August 26. That evening, he was operated on by Dr. DiStefano, who inserted a metal plate and nine metal screws into Haden's leg. On August 28, DiStefano placed Haden's leg in a soft, nonweight bearing cast and released him from the hospital. DiStefano instructed Haden to stay at home, get plenty of rest, keep his leg elevated, stay off his leg at all times, fill a prescription for pain medication, and see DiStefano in a week. Haden returned to see DiStefano a week later. DiStefano dressed the wound and placed Haden's foot in a hinged cast, again one that was not weight-bearing, but one that would permit Haden to flex and extend his ankle. DiStefano advised him to return home and to keep his leg elevated, but Haden could try to extend and flex his ankle as much as he could.

Haden returned a week later, as requested, and DiStefano removed the cast because of Haden's discomfort and placed his ankle in an Ace bandage. He once again instructed Haden

to return to his home, not to put weight on his foot, and continue to do as much extension and flexing as he found comfortable. It was at either this visit or the one before that Haden asked when he would be allowed to proceed with rehabilitation or training, and DiStefano replied that Haden could do nothing until the two large transverse screws had been removed from his ankle, and those would not be removed until 6 or 8 weeks after the initial operation. Haden asked whether he could go to the gym to do upper body weight training. Absolutely not, responded DiStefano, because Haden risked reinjuring his ankle.

Haden had the pins removed in an out-patient procedure on Monday, October 12. Haden went to the striking players' practice on Wednesday, after which he went to Veterans Stadium to receive therapy and rehabilitation. There he saw Davis, who volunteered his knowledge that the pins had been removed and said that it was time for Haden to get himself better. But Haden was escorted out of the training room by George Azar, an assistant to Harry Gamble, the Eagles' president and chief operating officer, because, he explained, Haden had to meet with Gamble. And so Haden met with Gamble, who said that Haden could use the Eagles' facilities for rehabilitation and therapy as long as Haden did not participate in strike activities. Additionally, he would be paid for that week because he had met the 1 p.m. Wednesday deadline. Haden returned to the training room, but was advised by Davis that practice was to commence for the replacement players and that no therapy or rehabilitation could be engaged in without the presence of the trainers, who had to be on the field. Haden left.

Haden did not return for therapy or rehabilitation the following day. Instead, he called Gamble to advise him that the efforts of the Union, the strikers' goals, were more important to the game than Haden's therapy and that he would go elsewhere for his therapy. Gamble responded that Haden had forfeited a week's pay; and Haden replied that he understood. So, Haden went to the physical therapists used by Dr. DiStefano and finished at about noon or shortly before. In his car, he heard that the Eagles' striking players went back to work, so he drove to the stadium. However, he saw nobody there, and he went home.

Haden was paid for the first two games of the year, but not for the canceled game or the three replacement games. He remained on injured reserve for the rest of the season and was paid for the remaining games. Prior to October 12, Haden had received no instructions from anyone associated with the Eagles other than to stay home, keep his leg elevated, and extend and flex his ankle. On September 21, he talked with assistant trainer David Price about where players were going to get their therapy in the event of a strike. Price replied that he did not know, but ''not here.''

(3) Dupre Marshall

Dupre Marshall, a free agent trying out for the Philadelphia Eagles, twisted his ankle in a practice session in mid-August and, from then on, did not engage in practices which involved physical contact. Instead, he did some light jogging and took hot and cold whirlpool baths at the Eagles' facility. The Eagles placed him on the injured reserve list before the opening regular season game, and Marshall received massages and continued to engage in his rehabilitation. On Monday, September 21, the day before the strike commenced, Marshall reported as usual to the Eagles' facility and received his whirlpool bath and massage. Word spread that there was going to be a team meeting in the team room, and Marshall attended it. He remembered Coach Ryan saying: ''You guys go out as a team and you come back as a team. We're not going to let this tear us apart.''

Later that morning, Marshall learned that Davis wanted to see him. According to Marshall, Davis asked him where he was going to be during the strike. Marshall answered: ''Here, receiving treatment.'' Davis laughed, saying that he would not receive treatment there, because he had directions for Marshall to go to Paoli Clinic to receive treatment. Marshall said that he guessed that his checks would be sent to his hotel room, and Davis laughed again, asking Marshall that if the other players were not going to be paid, what made him think that he would be paid. Marshall then stated that he thought that he would have to go home to San Francisco to work out and receive treatment, because he did not have enough money to stay in the Philadelphia area. Davis asked where he would go, and he replied to his old school, the University of California at Berkeley. Davis said that he knew the head trainer, Bob Orr, that he was a good trainer who would know what to do and would take care of Marshall, and that Marshall should just continue to do what he had been doing at the Eagles' facility. Then Davis gave Marshall the directions to the Paoli Clinic in case he decided to remain in the Philadelphia area and Davis' business card in case Marshall needed to call him for anything. Marshall cleared out his locker, made reservations to go to San Francisco the next day, and left town.

Marshall testified that Davis never asked him whether he was going on strike, and he never said one way or the other. He returned to to Veterans Stadium in the morning on Saturday, October 17, and saw a few players who told him that the players had been locked out. He returned on Monday and resumed full practice. He was not paid for the canceled game and the three replacement games.

(4) Other Eagles injured players; discussion

A blanket claim was interposed for eight other Eagles' injured reserve players: Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten, Alan Reid, and Ben Tamburello. This claim was based in part upon Coach Ryan's speech to the players, before the strike, that whatever they did, he wanted them to act as a team. Later, he stated on television that the players had to do what they had to do; but he did not want one or two players coming across to play. Either the players crossed the picket line as a team, or they did not cross.

Davis testified that he talked with all the injured reserve players and all those who had injuries or were susceptible to injuries or that needed follow-up care, some 12 or 14 players, and told them that they should not neglect their injuries during the strike. He wanted to make sure that they did not return from the strike in worse shape or that, when they returned, they did not have to go through another 1 or 2 weeks of rehabilitation in order for them to return to playing condition. Thus, if the players struck (he said that he told them that the Eagles' facility would be open), he gave them the names of and directions to two facilities where they could receive medical care and rehabilitation.

Davis' testimony was directly contradicted by a letter that Gamble sent on September 22 to the injured players saying: ''We have been advised that during the period of the strike, Club facilities will not be available for treatment or rehabilitation.''[48] In addition, Davis' testimony is contrary to what Ryan had told his players, that he wanted all of them out as a team, and he did not want one or two crossing the line. Finally, in addition to some rather serious testimonial discrepancies, Davis' recall of these conversations was vague. He could remember the general thrust of the conversations but could recall no specifics. That might be understandable if, indeed, he had similar conversations with the 12 or 14 players whom he said he had talked to; but his testimony was specifically contradicted by those players who testified. Furthermore, while Davis initially stated that he had the same conversation with all the injured players, he later denied talking with Haden. While initially denying that he knew at any time that Booth went to California during the strike, he later admitted learning that fact when Booth returned from the strike.

Gamble testified that customarily all players are presented with an itinerary prior to each football game, attached to a pregame booklet which contains information pertaining to that particular game, that sets forth all the players' activities leading up to the game, during the game, and after the game. Normally, Tuesday is a day off for all Eagles' players, but those who require medical treatment or rehabilitation are required to report. However, the itinerary distributed prior to the Eagles' second game listed a team meeting for 9 a.m. on Tuesday, September 22. That was done to enable him to determine who was on strike. If the players did not report to the meeting—and Gamble saw no player at the Eagles' facility that day (Davis saw one player who came in to get some things out of his locker)—they were on strike, so he thought. That was bolstered by his observation of the players the day before, removing their personal belongings from their lockers. Because no one was there on Tuesday, he wrote to the injured reserve players and others who were injured, instructing them where they could obtain medical attention and rehabilitation during the strike.

If he had merely written those instructions, I might have no problem with the Eagles' position, because the letter would be consistent with the Clubs' general position that the injured players still had the obligation to rehabilitate themselves. But Gamble's letter barred them from rehabilitating at the Eagles' facility, because he clearly stated that the Eagles' facility was closed and only the two other facilities were open. Unless there were separate arrangements made with the individual players, I find that the players met their requirements to rehabilitate by going elsewhere. The Eagles make no claim that any of these players otherwise failed to comply with the requirement that they engage in rehabilitation.

With respect to the individual claimants, I am persuaded that separate arrangements had been made for Booth. He was one of the players for whom the Eagles saw no future. The team was going to waive him as soon as his hand healed. It is natural that, having little interest in him, Davis would have had no urgent opposition to Booth's request to return home to recuperate, but merely recommended that Booth go to the Paoli Clinic. That Booth did not comply with the recommendation was not fatal to his claim, for the Club impliedly consented to what he did. Assistant trainer Price knew that Booth was going home. He wrote in his medical report: ''The player returned home for therapy. With this type of injury, there is no major rehabilitation prescribed as much as rest [and] active range of motion. This can easily be performed at home.''

Despite his denials, I infer that Davis must have been so advised that Price was going home, either by Price or by reading the medical report. Booth did not pay for his medical expenses in California, but had them billed to the Eagles. Because there is no record that Booth paid the bill, it is most likely that the head athletic trainer was consulted about the payment of this bill and approved it.[49] Finally, other than going to the location recommended by Davis, Booth complied in all respects with what his team required of him for his rehabilitation. I conclude that the Eagles, by failing to pay him for the canceled game and the three replacement games, violated the Act.

Because I have little regard for Davis' credibility, I have no difficulty crediting Marshall. Marshall wanted to come to the Eagles' facility to rehabilitate and Davis laughed in his face. Again, the players' testimony that the Eagles' facility would be closed is corroborated by Gamble's letter that makes that very statement. Thus, I credit Marshall's testimony that he stated to Davis that, because he would not be paid, he could not afford to remain in Philadelphia, and would prefer to return home to rehabilitate, especially because the Eagles' facility would be closed anyway. I also credit his testimony that Davis did not oppose what he intended to do. Davis' failure to oppose Marshall's wishes was consistent with Coach Ryan's plea to his players not to break ranks and to remain on strike as a team. Therefore, Marshall's return to California did nothing to negate his obligation to rehabilitate or countermand Ryan's wish that his players remain as a team. Otherwise, his benefit had accrued and did not defease. I conclude, therefore, that the Eagles violated the Act by failing to pay Marshall for the four games.

Haden's case is the easiest of all. Haden was incapable of any rehabilitation during most of the strike, certainly for the canceled game and for the first two replacement games. He is clearly entitled to be paid for those games. He followed the team doctor's orders to the letter. Even Davis admitted

[48] Booth testified that he never received this letter while he was in California, but saw it for the first time when he returned to Philadelphia at the end of the strike.

[49] In discrediting Davis, there are a number of other inconsistencies on which I rely, among which is his curious attempt to relate all the exercises that Booth could have performed if only he had reported to the Eagles' facility during the strike. Immediately prior to the strike, Booth was not required to do any of these exercises; and it would be surprising that the Eagles would insist that Booth become the ultimate physical specimen in light of the decision to release him as soon as he could manipulate his thumb. Furthermore, Davis' testimony directly contradicts the medical entry made by his assistant trainer that there was not much that Booth could do to rehabilitate more rapidly or effectively. After Booth returned from the strike, he was not required to engage in the kind of rehabilitation that Davis stated he should have engaged in during the strike. Rather, he was virtually left alone until the cast was removed in November. Then, Booth started on a program to restore the motion and strength of his finger, and he achieved the state ''compatible with playing football'' in 12 days, when he was terminated.

that he had never given Haden any indication that he was to report to the Club's facility in order to be entitled to be paid. When Haden first had the pins removed from his leg on October 12, he immediately reported to Davis for rehabilitation. When he did, Gamble attempted to extract from him a type of loyalty oath that he would not engage in any strike activities, which Haden not only refused to agree to but also had a right to refuse. An employee may engage in protected activities and also continue to work. As the Third Circuit concluded in *Emerson Electric v. NLRB*, 650 F.2d 463 (1981), it is still Board law ''that an employee who pickets during off-duty time cannot be regarded as a 'striker' against whom an employer can act. . . . So long as the employee meets the work commitment to the employer, the employer cannot act against the employee for his or her off-time actions, or Section 7 rights would merely be empty promises.'' (At 474, citing numerous Board decisions.) Accord: *Firestone Tire Co.*, 238 NLRB 1323 (1978), enfd. 651 F.2d 1172 (6th Cir. 1980). The Clubs' reliance on *Hoover Co. v. NLRB*, 191 F.2d 380, 389 (6th Cir. 1951), to the effect that an employee may not work and strike at the same time is accurate only to the extent that an employee may not engage in boycotts or other disloyal or disruptive conduct towards his employer. *NLRB v. National Furniture Mfg. Co.*, 315 F.2d 280, 284-286 (7th Cir. 1963).

Accordingly, the conditioning of Haden's return upon his disavowal and abandonment of his Section 7 rights was illegal, and he was entitled to be paid for the third replacement game. In addition, Haden testified that he was present at the Eagles' facility on October 15 when the players made their offer to return to work, and the Eagles, relying upon the illegal rule, rejected their offer. For this reason alone, he is entitled to be paid for the last game. I find that Haden is entitled to be paid four game checks.

That leaves the rest of the Eagles' injured reserve players, none of whom testified. However, I have already concluded that injured reserve players have accrued benefits, and the burden is on the Eagles to prove under *Great Dane* that it had a reasonable justification for withholding payment to these players. I find no such justification. The only reason given is that the players did not show up for the meeting with Gamble on September 22, an indication that they were on strike. The players were not being required to perform any meaningful function to rehabilitate or to learn their positions or to learn the tactics for the upcoming games. The sole purpose of the meeting, as explained by Gamble, was to determine who was supporting the strike. The scheduling of the meeting served the same function as a telephone call to each of the injured players asking them whether they were on strike or how they felt about the strike. I have concluded above that the injured reserve players were entitled to express their sympathy with the strike because their benefits had accrued and they could not play in any event.

Furthermore, the Eagles sent the injured reserve players no clear signal that they were expected to cross the picket line and rehabilitate at the Club's facility. I have already discredited Davis, who I believe would have relayed a message consistent with what Ryan told the players and consistent with what Gamble wrote to the players. That message was that the players were to stay together as a team. After all, at some point the strike would end, and Ryan took the calculated risk of encouraging the players to stay away from work in the hope that, when they returned, they would be a winning team. Gamble's letter ensured that Ryan's objective would be enforced. The Eagles' facility was closed to the injured reserve players, and their only option was to be rehabilitated at one of the two facilities named in Gamble's letter.

There has been an utter void of proof that the players failed to comply with their commitments to rehabilitate. I find that the Eagles illegally failed to pay game checks to all these players, with the exception of Ron Moten, for the four games, played and unplayed, during the strike. Moten reported on October 12 and began his rehabilitation then. He was paid for the last game and is entitled to be paid for only the canceled game and the first two replacement games. That Moten reported to work and was accepted for rehabilitation during the strike does not alter my conclusion about the other players. The Eagles simply may have changed their position when Moten reported or Moten gave in to illegal demands that he give up his Section 7 rights. In any event, Ryan's exhortation to his players and Gamble's letter stating that the Eagles' facility was closed were never rescinded. The players were entitled to rely on what appears to be the Eagles' policy.

The complaint alleges that this constituted a lockout. A lockout traditionally is used to bring economic pressure to bear in support of the employer's bargaining position[50] and occurs when an employer prevents his employees from entering his facility so that they can continue to work and earn a living. Here, to the contrary, the benefits of the injured players had accrued. As held above, the Eagles violated the Act by not paying them. All that happened was that the players were told to go to a different facility, at the Eagles' expense, in order to receive their rehabilitation. There was no adverse effect on the employees' protected rights.[51] There was no lockout, and I will recommend that the allegation of a lockout be dismissed.

h. *Larry Emery Jr.*

Part of the dispute regarding Larry Emery Jr. is somewhat different from all the rest of the injured reserve players. Although Emery, a first year running back for the Falcons, was placed on injured reserve as a result of an ''injury'' suffered during the first week of the regular season, one of the Falcons' defenses is predicated on the fact that Emery suffered no football injury. Rather, the Club contends that his status as an injured reserve player was the result of an inadvertent administrative error, that it was not immediately known what caused Emery's physical problem, and that he should have been placed on the reserve list for nonfootball injuries or illnesses (NFI). If that is how he should have been treated, the Club had no obligation to pay him at all.

During practice on Thursday, September 10, Emery noticed a numbness and coldness of his left arm. He reported the condition to the head athletic trainer, Jerry Rhea, who told him to sit out the rest of practice that day. The team physician, Dr. Charles Harrison, examined Emery later and found that he had no blood pressure or pulse in his arm. He was taken to the hospital, where he was examined by Dr. Daniel Jordan, a vascular surgeon, and admitted into the hos-

[50] *Challenge-Cook Bros.*, 282 NLRB 21 (1986), enfd. 843 F.2d 230 (6th Cir. 1988).

[51] *Harter Equipment*, 280 NLRB 597 (1986).

pital. The next day Jordan operated on Emery and removed blood clots from his shoulder and lower arm.

The General Counsel argues that, no matter what the actual cause of Emery's condition was, the Falcons made the assessment that he was to be treated as an injured reserve player. Indeed, the Falcons had ample opportunity to correct what is now alleged as an inadvertent mistake. After the Club had orally advised the NFL on September 11 that it was placing Emery on the injured reserve list, which was telephoned to the NFL office prior to Emery's surgery that evening, it was required to send in a formal written notice, which was prepared after the surgery and still showed that it was treating Emery as having a football-related injury and not one that was unrelated to football. Furthermore, except for the period of the strike, which coincided with the period that Emery was not reporting for work, the Falcons paid him. Nonetheless, when the Falcons received the surgeon's bills, it turned them in for payment by Emery's insurance company, because the services were rendered in connection with a nonfootball incident. If the team thought that it was actually football-related, it would have paid the bill itself as a workmen's compensation injury, for which it was self-insured.

Dr. Harrison's notes of his examination of Emery on September 10 state: ''Left arm went numb today after he hit somebody.'' That would indicate that the numbness was caused by the playing of football and the blow, however slight, that he suffered in hitting someone. However, Harrison discounted that there was a trauma to the artery by examining the films of the practice, which showed that there was no traumatic injury. But he also opined that, whether Emery hit someone or did not, he had previous blood clots in the area of his left arm which were bound to break off and obstruct an artery, whether in practice or when Emery rested or when he slept. The clots were formed because Emery had an extra rib (a cervical rib) on his left side, a congenital defect which caused his subclavian artery (behind the collarbone) to override the extra rib, to thicken, and to result in an obstruction. The surgery that was performed included the removal of Emery's extra rib, as well as the two clots which Dr. Harrison testified broke off from the main point of the obstruction and lodged in Emery's shoulder and above his elbow.

The General Counsel did not refute this medical testimony. I, therefore, find that the fact that the incident occurred on the playing field during a practice was a mere coincidence, and the clotting could have taken place at any time. It was not an injury which would have required that Emery be placed on the injured reserve list, which is for injuries resulting from football. This record persuades me that his injury did not result from the playing of football.

However, this is not to say that the Falcons were similarly persuaded. Rather, with one exception, the Club appears to have taken the position, without even thinking more about it, that Emery was injured because of his activities on the playing field. That prompted the Club to place him on injured reserve, a designation that was never removed by the Club during the season although it had ample opportunity to do so. In fact, this claim suffers from the same kind of infirmity that caused me to find an unfair labor practice in the principal claim in this proceeding. No one testified on behalf of the Falcons other than the doctor and the trainer, who added nothing to this part of the claim. While I have found that what Harrison said might well have been a legitimate reason for the denial of benefits to Emery, there is an utter lack of proof that the Falcons relied upon what Dr. Harrison testified to in this proceeding and denied Emery his benefits for that reason. Instead, the record reveals nothing more than an attempt to make amends for the alleged commission of a violation of the Act by contending that, if the Club had known the real reasons for Emery's condition, it would not have violated the Act, a lame, belated, pretextual excuse. The 8(a)(3) violations are based on a respondent's actual motivation, not a theory later interposed about what it would have done if only it had all the information it now possesses.

Nonetheless, I will recommend dismissal of this claim. After the surgery, Emery was released from the hospital the following Tuesday. Jordan told him to engage in no activities and to return to see him in a week. Harrison told him that he should not do anything but ''stay rather quiet.'' Emery decided to recuperate at his parents' home in Macon, Georgia. Before traveling there, he stopped by the Falcons' facility where Coach Marion Campbell told him that he could leave Atlanta and take his time in recuperating.

Instead of returning the next Tuesday for his scheduled appointment, Emery returned to the Falcons' facility on Monday, the day before the strike, ''to see what the situation was.'' Rhea was handing out letters and gave one to Emery, telling him that there was a possibility that a strike was going to occur and, quoting Emery's testimony, ''if you were to become a striker or going on strike these were places to go if you didn't come to the complex.'' Although Emery attempted to change this testimony, I find that this is exactly what he understood: If he were to strike, he did not have to rehabilitate at the Falcons' facility.

The reason why I am not inclined to permit him to change his testimony is that I believe little of the rest of it, particularly his claim that, after the surgery, he never saw Harrison, the team doctor. Harrison, however, had extensive notes of his examinations of and talks with Emery during the course of Emery's recovery and testified that, because Emery was traveling from Macon, he and Dr. Jordan, whose office was next door, were trying to see Emery on the same day. I credit Harrison completely. Thus, I find that the day after Emery went to the Falcons' complex, the first day of the strike, he saw Drs. Jordan and Harrison. Jordan removed the stitches in Emery's lower arm, cleaned the still open wound in his shoulder, and told him to return in 2 days. Harrison encouraged Emery to return to his running program.

Emery testified that, when he saw Jordan 2 days later, Jordan told him that he was doing better so he could engage in limited activities, but ''[n]o football, no running or no lifting at all.'' Jordan scheduled Emery for a new appointment in approximately 2 weeks, which would have been in October. However, Harrison testified that he saw Emery again on September 28, and Emery reported to him that he had seen Dr. Jordan the preceding week and that he was told that he could engage in some weight lifting. Emery reported to Harrison that he had been running and riding a bike, too. Harrison then advised Emery that he could do anything that he wanted to do, with increased running and lifting, and instructed him to see Jordan and to return in 2 weeks.

According to Emery, when he returned to see Dr. Jordan (probably a week or less earlier than Dr. Harrison's records

show that he examined Emery), his incision in his shoulder, which had closed in the interim, had reopened and was bleeding again. Jordan had to reopen the wound, clean it, and resuture it. Emery testified that Jordan forbade Emery from engaging in any activities until the wound healed perfectly.

Dr. Harrison's testimony, supported by his records, was vastly different. He saw Emery on October 9, and Emery told him that he had been doing all the things necessary to prepare him for contact football—running, bike riding, and weight lifting. He reported that he had seen Dr. Baskin, Jordan's associate, 2 days before and that he had removed a little stitch. To Harrison, the drainage had stopped and Emery was doing well and could continue to do whatever he felt like doing. That included working out with the regular team, still on strike. Emery was very anxious to do this, and Harrison had no objection, knowing that the team was working out in shorts and was not engaged in contact.

In sum, during the entire strike, Emery was physically able to engage in rehabilitation and, in fact, did so. He was never told that the Falcons' facility was closed to him, and he was not advised that he could do nothing. To the contrary, he knew that if he were to strike, there were other facilities that were open for his use; and his choice of not returning to the Falcons' training room was his fault, and no one else's. In addition, he did not return to the Falcons' facility before the third replacement game, and there was no reason given for his failure to return. For these reasons, I find that he was not entitled to be paid and conclude that the Falcons did not violate the Act.

i. *James Geathers*

James Geathers, a defensive end for the Saints, fractured his patella and tore ligaments in a preseason game held on August 29. He underwent extensive surgery on September 1 to reconstruct his left knee and was placed in a plaster cast from his hip to his toe. He was released from the hospital on September 5, with instructions from Dr. J. Kenneth Saer, the Saints' team doctor and orthopedic surgeon, to keep his leg elevated and return to Saer's office in 2 weeks to have the cast removed. On September 15, the plaster cast was replaced with a leather strap brace which limited Geathers' mobility in extending his leg; and Saer advised that Geathers could begin active motion of his leg by bending his knee from 45 to 90 degrees in order to break the scar tissues. Another appointment was made for September 29.

Geathers did his stretching exercises each day. He was able to do no more than two sets because of the pain, and each set took about 5 minutes. On September 21 he went to the Saints' facility and conferred with Dean Kleinschmidt, the Saints' trainer, who, according to Geathers, asked whether Geathers was going to participate in the strike. Geathers said that he had not yet made up his mind, but thought that he might like to receive his treatment in the morning and picket in the afternoon. Kleinschmidt stated that it was the team's policy that, once a player crossed the line, he stayed across, meaning that a player could not come to the facility and picket. A player had to make a choice—he could strike and picket outside or he could do his exercises in the facility, but he could not do both. Although Kleinschmidt denied most of this testimony, which is consistent with the instructions of the Management Council's September 18 memorandum, he agreed that he made the last statement.

Geathers went for a treatment that day. The staff looked at his wound and cleaned it. They supervised his leg lift exercise, in which Geathers, lying on his back, lifted his leg without bending his knee. He also worked out on an orthotron machine, which is a hydraulic resistance rehabilitation device. The trainers applied ice to his leg to relieve the pain and inflammation that usually accompanied that exercise. He was there for a half-hour, and the trainers cleaned his wound and applied ice to it to bring the swelling down. At no time did he watch films or attend practices.

Geathers refused to commit himself to any action, but, when the strike commenced, he was, although immobilized, on the picket line with the striking players, on six occasions, including September 22. On October 1 he saw Saer again, who adjusted his brace so that he could bend his leg a little more. He rehabilitated at a center which was affiliated with the hospital where he had his surgery. When the striking players decided to return to work, Geathers was with them; and they were told that they could not return because they had missed the Wednesday reporting deadline and because the players were not ready to play and might get hurt. He asked James Finks, the Saints' president and general manager, whether he could start his rehabilitation in the facility, the Saints' facility being much closer to Geathers' home than the hospital. Finks said no. Geathers asked why he could not, because he could not play anyway and because Finks had been contending that the players were not ready to play and might get hurt. Geathers returned the following Monday, October 19, and commenced his rehabilitation that day, and continued to rehabilitate at the Saints' facility for the rest of the season. Geathers was not paid for the canceled game and the three replacement games. He remained on injured reserve until just after Christmas, healing more quickly than Saer's original prognosis that Geathers' season was finished.

There is some factual dispute whether Geathers returned to the Saints' facility no earlier than September 21, as he testified, or whether he returned the day after his cast was removed, which would be about a week earlier. Kleinschmidt testified that he remembered seeing Geathers at the facility the preceding week. He said that his records showed that Geathers was present because they no longer noted that he was at home, as the records for his earlier recovery period show. Instead, they show that he was in a splint. Furthermore, in order to start the orthotron exercise, it was customary that the patient first performed straight leg lifts with light weights (2-1/2 pounds) and also rode an exercise bicycle. Kleinschmidt recalled that Geathers did both of these exercises the week before the strike. Finally, the doctor noted when he removed Geathers' cast that he could start to do some light lifting.

On the other hand, the exercise forms do not indicate that Geathers did any exercise that week, despite the fact that Kleinschmidt admitted that the trainers would have been interested in the progress he was making, in other words, how many repetitions he was doing and with what weights, data that, I find, someone would want to record and not trust to memory. However, I was impressed that Geathers overcame a serious season-ending injury and rehabilitated with such diligence that he returned before the season ended. It seems to me that Geathers would have lost no time in beginning his therapy, and I find that he returned to the Saints' facility as soon as he could and thus as early as the Saints contend.

Geathers was told on September 21 by either Finks or another representative of the Club, that injured reserve players could strike, in which event they would not be paid; or they could continue to receive treatment in the Saints' facility, in which event they would be paid. Geathers was clearly aware that he had made a choice by going out on strike. He conceded: ''I know I wasn't going to get paid because they said that before the strike started. . . . [I]f you strike, you're not going to be paid.'' But the choice he made was only after being told by Kleinschmidt that Geathers could not both receive treatment and strike. That, as I concluded in the discussion of the Haden allegation (above), misstates Board law. Geathers was entitled to continue his rehabilitation in the Saints' facility and to continue his support of the strike. Kleinschmidt prohibited him from doing so. The Saints argue that Geathers was picketing during regular work hours and so he should not be entitled to his benefits. However, the Club prohibited him from his normal rehabilitation unless he waived the right to engage in picketing. He was, therefore, was entitled to support the strike at his pleasure.

By illegally conditioning Geathers' access to the training room facilities, the Club may not rely upon his failure to cross the picket line to receive his rehabilitation. He was entitled to support the strike. That being so, the Saints did not meet its burden to prove under *Great Dane* that they had a valid justification to refuse to rehabilitate Geathers.

j. *Chris Godfrey*

Chris Godfrey, an offensive guard for the Giants, suffered a knee injury, a medial collateral ligament sprain, during the team's second regular season game. He was taken on a cart from the field and driven to the locker room, where the trainer put a Jobst ice boot on his left leg. The boot is filled with a cold fluid and applies even pressure to the leg. The next day, Monday, the swelling of his knee had increased dramatically. Trainer Barnes gave him another treatment with the boot and then sent him to get a magnetic resonance imaging (MRI) examination in New York City. Upon Godfrey's return to Giants Stadium in New Jersey, Barnes instructed him to report to the Meadowlands Professional Sports Care clinic the following day, which was the first day of the strike.

Godfrey was placed on injured reserve on September 25, after the strike commenced. His benefit, therefore, had not accrued at the time of the strike; but, of course, it became accrued once the Giants placed him on the injured reserve list. Godfrey received a variety of treatments at the clinic there for the remainder of the week and daily, excluding some Saturdays and Sundays, until October 16. He rode an exercise bike and received the ice boot. He also exercised in an Aqua Ark, a large tub of water in which the patient is suspended and can perform exercises without putting any body weight on the injured leg. Although most of his earlier rehabilitation was supervised by James Madaleno, one of the Giants' assistant trainers, he was also seen and consulted from time to time by Barnes and team doctor Warren, who also had a financial interest in the facility.

At the conclusion of his rehabilitation workout on October 16, Godfrey, noting that the strike was over, asked Barnes whether he wanted him to report to the clinic again on Monday. Barnes told him to report to Giants Stadium and from that point Godfrey did. The workouts were almost identical. Madaleno supervised his treatment that Monday. The only treatment that was unavailable at the stadium was the Aqua Ark, but by that time Godfrey was able to put full weight on his legs.

Godfrey was not paid for the canceled game or the three replacement games. No one questions the facts that he never announced to anyone that he was on strike or that he was not on strike. The salient factual issue arises in Barnes' testimony that, the day before the strike, Godfrey asked ''where are we supposed to go for treatment?'' and Barnes replied that he had made arrangements ''for striking players'' to go to the clinic. Godfrey said that nothing was mentioned about the strike at all. I discredit Barnes' narration for two reasons. First, he tried to limit his role in caring for Godfrey, but I am persuaded that Godfrey's detailed notebook that he kept of his treatments accurately reflected that Barnes tended to him often during the strike. Because the Management Council had directed that trainers were not to administer treatment to strikers outside the team's facility, Barnes must have known or thought that Godfrey was not a striker. Second, I found that Godfrey was too involved with his own injury to care about anybody else, as evidenced by his notebook, and would not have asked where others were to go for their rehabilitation. He would have asked only where he was to report. He knew that the strike was going to occur by the following day; and that obviously was the reason for his question.

Barnes assumed that Godfrey, a starter, would not cross the picket line (Coach Parcells had asked all the players to remain together) and instructed him to report to the clinic. He clearly never offered Godfrey a choice, such as, if you are going to be on strike, go to the clinic, but if you are not, come to the stadium. Nor did Barnes tell Godfrey prior to October 16 to report to the stadium. Accordingly, I find that Godfrey did exactly what he was told to do in order to receive his rehabilitation. I conclude that the Giants violated the Act.

k. *Mike Hamby*

Mike Hamby, a defensive end for the Bills, was operated on for a recurrent ailment in his right hip on September 11. When Hamby was released from the hospital on September 16, Dr. Richard Weiss, the team doctor, told him to go home and rest and stay off his leg, which he did. That is about all that the principal witnesses agreed on. Between Bill Polian, the Bills' vice president for administration and general manager, who was very confrontational, failing to answer questions which were capable of answering, and was often incorrect in his recollections, and Hamby, whose story partially made little sense, it is not particularly easy to reconcile the testimony, but the following is most probable in the circumstances.

On Tuesday, September 22, Hamby attended a meeting of the players, called by the union representative, followed by a brief meeting of the team's injured reserve players with Polian, at which Polian said that he was going to pay the injured reserve players, but they had to come to the stadium to receive their therapy. (Polian testified that he held an earlier meeting with the injured players the day before, but I am persuaded that Hamby did not attend it.) During the 12 days from the time of Hamby's surgery to the Tuesday meeting, he had not come to the stadium to receive any treatment. Instead, he had followed Dr. Weiss' instructions and stayed

home. After all, he had a 10–12 inch incision and staples in his hip; and Polian's initial account that Hamby was well on the way to full recovery, that he was capable of running, that he ran every day, and that he was capable of performing his rehabilitation schedule which had been set up for him and included running, weight lifting, and resistance exercises was clearly inaccurate, as Polian later admitted. Nor do I believe Polian's later testimony that Hamby was ambulatory and had no need of crutches, contrary to Hamby, who testified that he needed crutches and was consistently advised that he must stay off his feet and do only so much as he needed to get around his apartment.

Common sense would indicate that with such a massive wound, held together by staples, Hamby was not nearly in as good shape as Polian said. In addition, Weiss did not testify nor did the Bills introduce any medical records which would indicate that Hamby was well enough to do anything. When Polian announced that the injured players were required to cross the picket line to receive their therapy, that condition constituted a change in the team's rules as they pertained to Hamby solely because of the occurrence of the strike and for no legitimate purpose. Up to the strike Hamby was not physically able to engage in any form of rehabilitation and did not do so; nor was he required to do anything.

Further, I find that, in any event, Hamby did exactly what was required of him by the team doctor, who is normally the person who makes decisions on health care for all the Clubs. When Polian announced that therapy would be available at the Bills' stadium, Hamby asked Dr. Weiss, who also attended the meeting, what he was supposed to do. Weiss said that he needed to go home and rest, not do any exercise, and stay off his leg, but he could do whatever he could to get around the house. Weiss added that he could not possibly come back for rehabilitation and might do himself some harm by doing so.

Nonetheless, Hamby returned to the stadium the next day to complain that he was being treated disparately from his roommate, Hal Garner. Polian said that Garner could not even come into the facility, but Hamby could; and that Hamby should do whatever he could, like other injured reserve players, such as attending practices. Because there were no practices that day, there was nothing for Hamby to do, and he went home. But he was fearful that he was going to lose too much money. He returned before the deadline on the Wednesday before the third replacement game. He spoke with Dr. Weiss, who said that there still was no therapy or rehabilitation that Hamby could engage in, but that Hamby could go to the team meeting and watch practice, which he did.

There is nothing in this record that indicates that attending meetings and watching practices are not part of the therapy to be engaged in by injured reserve players, even when they could not engage in therapy or rehabilitation. Much of this is hardly to the point. Prior to the strike, Hamby was still recuperating and was never required to attend practices or film sessions or get his therapy at the Bills' facility. It was only the event of the strike that spurred Polian's direction, which was consistent with the Management Council's memorandum of September 18, that the injured reserve players had to alter their regimen and henceforth report to the facility. Why it was not necessary for Hamby to report the day before the strike but necessary for him to report when the strike began was not explained, and it was the Bills' burden to supply that explanation. Its failure to do so is critical, because it had that burden under *Great Dane*. Accordingly, if there were no other defense interposed, I would conclude that the Bills violated the Act by failing to pay Hamby three payments.

The Bills contend, however, that Hamby waived his claim to these payments. On October 28 he signed an agreement to defer his salary to 1988. That agreement was a form agreement, the purpose of which was ''to amend the payment schedule for compensation that may be earned under'' Hamby's original contract. It had four columns on it which were filled in, the first two being the week number and gross salary for that week, followed by two columns for the gross to be paid currently and on January 15 in the next year. Hamby signed an agreement which required payment in 1987 of $6250 for the first 2 weeks of the season, as well as the last replacement game (game 6) and the first game (game 7) played by the returning strikers. Next to weeks 3, 4, and 5, however, was the word ''strike'' and the gross salary for each of those weeks stated ''0.''

Polian also signed this agreement, but there was no testimony elicited as to how the document came into being, other than the fact that Hamby came to the Bills' office and asked for it and that it was prepared by a secretary. There was no discussion about whether Hamby was entitled to his salary during the strike, nor does there appear to be any evidence that he had any dispute about whether he was entitled to it. Indeed, the document was introduced during the examination of Polian, but I have no doubt that the General Counsel was aware of it at the time that Hamby testified, because the General Counsel had subpoenaed all the relevant documents and raised no issue of his lack of knowledge when it was offered in evidence.

The effect of the deferral agreement was to decrease his gross salary by $18,750, the amounts which would have been due to him for the canceled game and the first two replacement games, which I have found he is entitled to because of the Bills' unfair labor practice. In somewhat different circumstances, the Board in *Ideal Donut Shop*, 148 NLRB 236 (1964), enfd 347 F.2d 498 (7th Cir. 1965), that backpay is a remedy which the Board provides in the public interest to enforce a public right, and ''No private right attaches to a discriminatee which he can bargain away or compromise . . . .'' Id. at 237; see also *Clear Haven Nursing Home*, 236 NLRB 853, 855 (1978) (''[T]here is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual discriminatees.'') (Footnote omitted.) I am loath, therefore, on this record, to cut off Hamby's statutory rights merely because he signed a deferral agreement.

Furthermore, there is nothing in this record that Hamby had any understanding that he had any legal right and that he was waiving anything. A waiver is a deliberate relinquishment of a legal right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). It is impossible in these circumstances to determine whether he intended to waive anything, especially because there appeared to be no consideration for his waiver. In all the circumstances, I conclude that the better course here would be to order the Club to make the payments to Hamby, subject, however, to its right to contest in the compliance proceeding the validity of the purported waiver and subject

also to the right of Hamby to choose to refrain from receiving the backpay award due him after final determination of his rights has been made.

l. *Jets*

(1) Jeff Price

Jeff Price, a wide receiver for the Jets, injured his back during training camp on August 6. His initial treatment of ice and heat did little good. Associate team doctor and orthopedic surgeon, Dr. Elliot Hershman, ordered him to have an MRI and a CAT scan and, finally, the Jets put Price in a hospital on August 15, where he stayed in traction and underwent therapy for about a week and one-half. When Price was released from the hospital on August 26, Hershman told him that the traction and therapy were not doing him any good. Instead, he prescribed bed rest which Price could do at home, because he did not want Price up and about walking back and forth to training camp. Hershman wanted Price to come back in 4 weeks to be reexamined by him and the two other doctors who had followed his progress at the hospital. Price returned to the training camp and saw the Club's head athletic trainer, Robert Reese, who delivered the same instruction for bed rest as did Hershman. Price went to his fiancee's sister's home in Atlanta on August 27.

On September 22, Price called Reese and told him that he was concerned that the strike would affect his pay. Reese said that it would if he were on strike and that it was up to him to determine whether he was on strike. Price testified that Reese told him that, to be paid, he would have to resign from the Union and that Price should contact his player representative to find out how to go about resigning. Reese said that he would have to submit a letter of resignation to the Union. Price asked whether Reese still wanted him to come to New York to see the doctors, as Dr. Hershman had instructed him to do 4 weeks before. Reese said that since Price was a striking player, he was not allowed on the facilities of the Jets for any type of therapy or anything. Price did not deny that he was a striking player.

Because Reese seemed unsure of what Price had to do, Price called Steven Gutman, then the administrative manager (and at the time of the hearing the president) of the Jets, whose telephone number Reese had given him. He also asked Gutman whether the strike would affect his pay, and Gutman also replied that it would if he were on strike. Just as in his conversation with Reese, Price did not say that he was not on strike; nor did he ever at any time tell anyone associated with the Jets that he was not on strike. Price also asked Gutman what he would have to do in order to be paid. Gutman answered that Price would have to resign from the Union, and that the decision was his.

About a week later, Price again called Reese to get more information about how to resign. Reese referred him to Gutman who said that, if Price decided to resign, he should send the letter overnight to the Jets and a copy to the Union. About 2 days later, Price called Gutman, again to find out more information about resigning. Gutman replied that he had already given him that information and had told him what to do, and that he was tired of Price calling. He hung up. Still persistent, Price called Gutman again the next day and asked whether the Jets would put in writing that the team was obligated to pay him all amounts due under his 1987 contract. Gutman said that he would not.

On October 6, with the permission of the Jets, Price went to get an opinion from another doctor, who recommended that he undergo a myelogram. He later consulted with Dr. Hershman, who agreed that Price should have the procedure, but he wanted it performed in New York under the supervision of the Jets' doctors. Price underwent the procedure on October 20 and, on the advice of Dr. Hershman to continue bed rest and to go home, within a day or two returned to his parents' home in Virginia. He remained there for about 2 weeks and then returned to Atlanta. Price never returned to the team's facility during the entire 1987 season, nor was he asked to return, for therapy, rehabilitation, or attendance at meetings, film sessions, or practices.

The principal claims of the Jets are that Price never denied that he was on strike, that he admitted that he was on strike during the entire period of the strike, that he notified Reese in late September or early October that he intended to remain on strike, and that he refused to keep appointments with three doctors during the strike. The first three reasons, even though factually accurate, as a matter of law, have no significance. The failure to deny that he was on strike does not in these circumstances result in the conclusion that he was on strike. Price was not well enough to be on strike. He could do nothing and had been sent home because he could do nothing. His recuperation was based on a program of rest for his ailing back, and there were thus no services that he could withhold as a striker. His statements that he was on strike were merely indications that he supported the strike and that he would have withheld his services if he could have performed those services.

The more serious contention is that Price had the duty to cooperate to the best of his ability in the course of his rehabilitation, and the question, therefore, is whether he willfully refused to keep scheduled appointments. Accepting for the sake of argument the Jets' testimony, I find no factual support that the Club relied upon Price's failure to return to New York 4 weeks after his discussion with Dr. Hershman. Rather, the Club's emphasis for denying him his pay was that he refused to resign from the Union, notwithstanding the denials of Reese, Gutman, and Pepper Burrus, the assistant trainer, that Reese and Gutman asked for Price's resignation and their testimony that they only asked Price whether he was on strike or not. Burrus kept detailed and copious daily logs which confirm that resignation was the key to Price's being paid. Burrus' log states that Reese explained to Price on September 22 that he had to declare whether he was in the Union or not and what Price had to do in order to resign from the Union. Price was concerned then, and continued to be concerned throughout the strike, with being paid, particularly if his back injury continued and the Union would no longer represent him. Reese then gave Price the telephone number of the Jets' player representative and told him to check about how his membership would affect his rights to continue to receive his pay. In the meantime, if Reese did not hear further from Price, he would assume that Price was ''still in union and on strike.''

On September 29, Burrus recorded that Price called to ask what to do to resign from the Union because he needed his pay and did not think that the disputed subjects which led to the strike would benefit him. Burrus told him to write the

letter to the Union and the Jets and send it overnight to be received by the Jets in time for the (then) Friday deadline. The request that the letter be sent to the Union supports my finding that the Jets were looking for Price's resignation. If all the Jets were looking for was a simple declaration that Price was not on strike, there would have been no reason for him to send a letter to the Union. The following day, Burrus wrote that Price again called and asked how to resign from the Union and if he could still have injury protection. Burrus told him that he would maintain injury protection. (I note that Burrus never said to Price that he did not have to resign from the Union in order to maintain his injury protection or to signify that he was not joining the strike.) On October 1, Burrus recorded his conversation with Gutman, who told him, according to Burrus' testimony, that he had heard from Price and that he had not yet stated his position as to whether he was on strike or not. Yet Burrus recorded in his notes that Gutman reported that Price had not *resigned* from the Union and that it was in his lap to do as he wishes.

Burrus testified that, when he wrote ''resignation'' in his log, that was only an impression that he received, but the detailed picture presented by his log in no way constitutes a one-time ''impression.'' His explanation at the hearing was unbelievable and concocted. Burrus had no difficulty using the English language to express himself, and his notes were not fabrications of the contents of his telephone conversations with Price or his conferences with Reese and Gutman. Rather, I find that someone explained to him what might be involved by his repeated use of the word ''resign'' and that he tailored his testimony in this proceeding to benefit his employer, the Jets, as evidenced by his realization, ''[W]ow, I shouldn't have used that word.''

Burrus was willing to say anything to protect his training department and was especially antagonistic to Price, who, he believed, was not showing the kinds of physical or neurological objective symptoms that supported his complaints of back pain. Although Burrus later denied it, he was seeking to create the impression that Price was malingering and was not seriously injured. Under some pressure, Burrus finally admitted that back ailments are very difficult to diagnose and, even without physical evidence, a person may nonetheless suffer greatly with a sore back. In addition, the Jets sought to create the impression that Price was lying when he testified that he was diagnosed as having either a herniated or bulging disc. There is sufficient support in the record that he was amply justified in believing that he had such a condition.

Reese denied that he told Price that he had to resign. When Price asked how he could be paid, Reese said that Price ought to declare that he was not on strike and that, in order to protect himself from disciplinary action by the Union, he should think about resigning from the Union. Reese's explanation about resigning makes little sense. First, he testified that he was instructed to tell the players about the option of resigning only if asked. Here, however, Price never asked; but Reese still said that he mentioned the option. Second, Price was at home. Obviously, he was not crossing a picket line. Because Reese's only requirement was that he write a letter, there was no chance that the Union would find out that he had declared himself opposed to the strike.

Third, the Jets' insistence that a letter be sent to the Jets demonstrates that the subject of the letter had to be about resignation, because the Union would have to be informed of Price's decision. There would be no reason for any player to advise the Union of his decision not to support the strike, a notification that might result in the type of disciplinary action that Reese was warning Price about. Finally, Reese admitted that it was possible that he advised Price that his benefits would be protected if he resigned from the Union.

I find that Reese misunderstood the import of his words and thought that resignation from the Union was a necessary element of a player's declaration that he was on strike. Burrus' notes, which I have held accurately reflect his conversations with Gutman and Reese, show that Burrus heard Reese talk about resignation; and Burrus had the same inaccurate understanding. Finally, even if I were to accept the testimony of all the Jets' witnesses, I would conclude that Reese and Gutman were asking Price for his declaration that he was not striking in order to get his benefits. They were asking him to relinquish his Section 7 rights of union affiliation and to become a strikebreaker not because they needed him to play (he could not) or to rehabilitate (he was rehabilitating adequately in Georgia and Virginia before the strike) but for some reason wholly unrelated to a reasonable business justification required by *Great Dane*. I find a violation.

(2) Jeffrey Nowinski

Jeffrey Nowinski, a tight end for the Jets, injured his right ankle during training camp on July 27. He saw Dr. Hershman a week later, who advised Nowinski to stay off his foot and not practice until his ankle healed. The Jets placed him on injured reserve on August 27, and he went for therapy at the Jets' facility until about September 9. Then, he returned to see Dr. Hershman, and on September 10, Reese told Nowinski that both Reese and Dr. Hershman thought that his ankle would heal in a week or two; that they could send him home or he could continue to rehabilitate at the Jets' facility; and that he should be healed by September 21, at which time the Jets would release him. Reese said that Nowinski had done a good job of rehabilitating his ankle and that he should just go home. He prescribed no specific rehabilitation, but Nowinski should continue to run. If his ankle had not healed, the Jets would bring him back for reevaluation.

On September 11, he left New York and went to his home in California. Soon, he began to worry about his status, especially because his ankle seemed to be no better and, upon his release, he would be without pay. On September 17 he telephoned Joe Patton, another of the Jets' assistant trainers, to ask if he could get a second opinion about his ankle's condition. Patton approved his request and told him to have the doctor's bill and findings sent to the Jets. Patton also told Nowinski that the Jets wanted him to see either Dr. Friedman in Los Angeles or Dr. Hershman in New York and said that he would be in touch the next Monday. On or about September 21 Nowinski went to a different doctor to get a second opinion. He opined that Nowinski had a very serious ankle injury for which he should receive rehabilitation for 4 weeks, 2 to 3 times a week.

The following day, Patton called him twice and said that the Jets had released and waived him and his contract was now terminated. However, he wanted Nowinski to come

back to New York that day or the next so that Dr. Hershman could reexamine his ankle. Nowinski said that the notice was too short, and Patton said that he would try to set up an appointment for the beginning of the next week. Later he called back with the travel instructions and told Nowinski to discontinue all therapy until he saw Dr. Hershman. On September 24 Nowinski called Patton to tell him that he could not return to New York on Monday—he needed to attend a funeral in California—and his appointment was rescheduled for October 1. On September 28, the Jets received Nowinski's injury grievance protesting that he had been released from his contract before his injury had healed. Nowinski returned to New York on September 30 and was reexamined by Dr. Hershman on October 1, who confessed error in his first examination. His ankle injury was more serious; there was a chip fracture. He should start treatment for at least 6 weeks, perhaps 8 weeks, rehabilitating the ankle at least two times a week. Hershman wanted to see Nowinski 6 weeks later, about November 12.

Nowinski went back to the Jets' facility, where he met with Reese and Jim Royer, the Jets' director of player personnel. Reese said that the Jets would continue to treat him until he was well and, according to Nowinski, gave him three choices. He could stay in New York and receive treatment somewhere outside the Jets' complex, in which case he would be considered a striking player, would not be paid, and would have to pay for his own room and board. The second option was that he could resign from the Union, in which event his injury grievance would be withdrawn. He would stay at the same hotel as the replacement players stayed, and he would rehabilitate his ankle at the Jets' facility. The Jets would pay him, including the back pay the team had not paid since it had released Nowinski on September 22. The third choice was that he could return to California and receive treatments there, but he would not be paid.

Reese's recollections of what he told Nowinski substantially agreed with the first and third options. Reese claimed, however, consistent with his testimony about Price, that he never mentioned resignation from the Union, except in the context of giving Nowinski the option of crossing the picket line, in which event he might be subject to discipline by the Union. To avoid that, he might want to consider resigning from the Union. With respect to this second option, he would be treated at the Jets' facility for as long as it took to heal his ankle, but when the strike ended, he would then be responsible for his own housing. Reese denied that he said anything to Nowinski about making up the backpay for the canceled game.

Nowinski asked why he was now being offered a choice of striking or not striking, when he had been released and was not even on the team. Reese did not directly answer. Instead, according to Nowinski, he recommended that Nowinski resign from the Union and get his money immediately. If his ankle healed in time, he could play on the replacement team. Nowinski said that he feared that, if he resigned from the Union, he would lose all his rights under the collective-bargaining agreement and would be unprotected, which would leave open the possibility that he would not be reimbursed for his rehabilitation. He told Patton that he was going to remain on strike, return to California, and receive treatment there.

On October 20 Patton telephoned Nowinski and told him that he was being placed back on the injured reserve roster (according to Nowinski, as of his visit to Dr. Hershman on October 2). Reese had told Patton that, ''since the strike was over and . . . Nowinski had not recovered [from his injury], we were obligated to place him back on the injured reserve roster;'' that the strike was now over and Nowinski was costing the Jets money once again; and that he wanted Nowinski to return to New York to be reexamined. Nowinski flew back and saw Dr. Hershman on November 1 or 2, who said that he had underestimated the seriousness of his injury. The structures of his ankle were not healing properly and he had a floating bone chip which was starting to move into the joint. That could cause serious problems and should be removed surgically. Nowinski had surgery on November 18 in California.

The Jets did not pay Nowinski for the canceled game and the three replacement games. Even accepting with the Club's version of the facts of this claim, I find no justification for its refusal to pay for the canceled game. Nowinski's benefit had accrued. He had gone home with the full approval of the team and had rehabilitated in California. He had complied with all that he was supposed to do. When the strike occurred, he was still in California; and his only obligation was to return to New York to be reexamined by Dr. Hershman. That appointment was delayed until after the canceled game because Nowinski wanted to attend the funeral of a friend of his, and the delay was never claimed as an unreasonable or unjustified excuse, or, until the brief filed herein, as a reason to deny him his pay. Even if I found that its defense was anything other than a delayed pretext, I would find nothing valid and reasonable about its position. Because Nowinski had a bone chip, there was nothing that he could do to rehabilitate. He thus did not refuse to perform any service that might have been beneficial to the Jets. In these circumstances, under any theory, I conclude that the Jets violated the Act by failing to pay Nowinski for the canceled game.

As to the replacement games, the Jets had a right to require Nowinski to return to its facility for rehabilitation, provided, of course, that its directive was not merely a subterfuge to get Nowinski to make up his mind to cross the picket line. Nowinski had rehabilitated at the Jets' facility before he was permitted to return to his home in California in early September. The parties had different motives for Nowinski's return to California. He wanted to avoid paying rent and finally agreed to return to California when he was told that due to his missing so much practice he had little chance of making the team. The Jets thought that he would be fully recovered by the week of September 14, so the Club would release him then because he was not going to make the regular squad anyway. When Nowinski did not fully recover and the Jets asked him to return to New York, and Dr. Hershman found that Nowinski's ankle was still sore, the Jets were not necessarily changing his treatment schedule when the team asked that he rehabilitate at the Jets' facility. That is where he had engaged in his treatments on a daily basis before he left for California.

Thus, I would not have considered a mere request to return to the facility a violation of the Act, as the General Counsel's brief suggests. But I find telling the fact that, when the strike ended, Nowinski was reinstated to the in-

jured reserve list and was permitted to rehabilitate in California. He was not required to return to the Jets' facility; but he was paid for all games played, leading to the conclusion that the requirement that he return to the Jets' facility during the strike was merely a sham. The Jets gave no valid and substantial business reason for its requirement that Nowinski should rehabilitate at the Jets' premises during the strike, except the suggestion that perhaps he could have played for the replacement team, an unlikely event because Nowinski's rehabilitation was anticipated to take 4 to 6 weeks, and Reese did not testify that he believed that the strike would continue so long.

Equally important, I find that Reese conditioned Nowinski's return to the Jets' facility upon his resignation from the Union. As noted above, there was a conflict in the testimony about whether the Club wanted Nowinski to resign from the Union in order to return to the Club's facility. I was unimpressed with Nowinski's powers of recollection. Particularly, I found in his testimony moments of sheer lack of candor and a reluctance to answer questions directly. His interpretation of various events was sometimes skewed. For example, he understood that one of Reese's options, that he would be considered a replacement player and would be paid accordingly, meant that he would not be paid his contractual salary but would be paid what replacement players were being paid. That was an unwarranted conclusion, especially when he could not recall that Reese said that he would not receive his contractual salary.

I am also persuaded that, when Reese allegedly mentioned that when Nowinski resigned from the Union, his grievance would be ''thrown out the window,'' what was actually said was that Nowinski would then be getting all his pay and all his medical expenses that he was seeking in his grievance proceeding and, therefore, the grievance would not have to be pursued or would be ''null and void,'' as Nowinski stated in his prehearing investigatory affidavit. Furthermore, Reese's second alleged option, that Nowinski had to resign from the Union, is not mentioned in Nowinski's prehearing investigatory affidavit, an omission that could easily persuade me that the option was never mentioned. A somewhat convincing case could be made that Nowinski merely assumed, as his testimony during cross-examination appeared to confirm, that a replacement player could not be a member of the Union. Therefore, when Reese gave Nowinski the option that he could cross the picket line and be treated as a replacement player, he, being a member of the Union, may well have understood that he had to resign from the Union.

However, I have previously found that Reese testified untruthfully about his conversations with Price. The discussion above, particularly in reference to Burrus' log, shows conclusively that Reese was under the impression that a player had to resign from the Union in order to return to the Jets' facility. I find that it is equally probable that Reese made the same demands of Nowinski. The conflict represented in this claim could have been clarified by the testimony of the only witness to the conversation, pro Personnel Director Jim Royer. However, he was not called as a witness; and I infer that his testimony would not have supported Reese. So, despite the fact that I do not have the utmost faith in what Nowinski had to say, I find even less credence in Reese's testimony, because he was so utterly contradicted by the written log of Burrus. Accordingly, I conclude that the Jets violated Section 8(a)(3) and (1) of the Act by conditioning Nowinski's return to their facility on his resignation from the Union, as well as the other reasons set forth above.

m. *Woodrow Lowe*

Woodrow Lowe, an outside linebacker for the Chargers, was on injured reserve for the entire season. He underwent arthroscopic knee surgery on September 8 and returned to the Chargers' training facility to begin his therapy the following day. From that day to September 21, Lowe went to the team's facility every day, 7 days a week, to rehabilitate, attend team meetings, and, after several days, watch team practices. Lowe testified that on Monday, September 21, he had his therapy to strengthen his knee and took a test on the Cybex machine, during which he said to Mark Howard, the Chargers' head athletic trainer, ''[H]ere we go again,'' referring to the fact that there was about to be a repetition of the 1982 strike. Howard replied that it was foolishness, and Lowe said that, as an injured reserve player, he did not know what to do. Howard said that he did not know, either. Early in the afternoon, Head Coach Al Saunders met with the players and told them that, whatever happened, he wanted the team to stay together and to stay in shape as a unit.

On the following day, Lowe did not report to the team's facility. Instead, he telephoned Howard between 7 and 8 a.m. and, according to Lowe, asked him; ''Do I come in?'' Howard said no. Lowe then asked: ''Can I come in?'' Howard said no: the players were on strike and they had been locked out. Lowe said that he had to get his knee rehabilitated, and Howard told him said that provisions had been made for him to go to the Sports Injury Clinic.

Except for 2 days, Lowe attended the clinic every weekday during the strike. He also saw the team's doctor, as Howard requested. He also carried a picket sign about 12 to 15 days of the strike, staying about an hour each time, and he practiced with the striking players every day, but one or two, that they practiced, or at least attended those practices. He voted, with his teammates, on October 15 about whether to return from the strike and to play that weekend. He denied that at any time Howard told him that, if he were not on strike, he could have rehabilitated at the Chargers' facility and received his game checks. He also denied that at any time Howard told him that, if he were on strike, he would have to do his rehabilitation at another facility and would not be paid.

Howard's testimony was predictably quite different from Lowe's. He could not recall having a conversation with Lowe on Monday, September 21. He denied that he said anything on September 22 like that testified to by Lowe. He said that he would not have told Lowe that he was locked out or that he could not come in for therapy, because he would not have made that kind of decision. Furthermore, he had been advised about the position of the Management Council that players who did not report for therapy were on strike and that the team had to provide treatment for players elsewhere.

At the time he testified, Howard was no longer employed by the Chargers and thus had no particular interest in this proceeding, except perhaps loyalty to his former employer. Conversely, Lowe had much to gain, namely four game day checks. Although that is not definitive, I find support for Howard's testimony in his understanding of the Management Council's rules and Lowe's clear support for the Union,

which would make me think that he had no intention of breaking the strike. In addition, Lowe knew that one other regular player on injured reserve had returned to the Chargers' training facility and thus would have no reason to believe that the training room had been closed to him. I find that Howard was at the facility on September 22 and was ready and able to continue Lowe's therapy if Lowe had reported to the facility, as he had steadily for weeks before. Because Lowe did not continue his rehabilitation, the Chargers were not obliged to pay him for the games scheduled during the strike, except for the last replacement game, because Lowe reported on October 15 and was illegally denied reinstatement. Otherwise, I recommend that this allegation be dismissed.

n. *Mark Mullaney*

The claim of Mark Mullaney, a defensive end for the Vikings, involves the nonpayment of two game checks, the canceled game and the first replacement game, and an 8(a)(1) claim that Vikings' general manager and executive vice president, Mike Lynn, tried to get Mullaney to resign from the Union. These allegations have been complicated by a violation of the sequestration order, which I granted at the beginning of the hearing, and the Vikings' failure to produce certain subpoenaed documents.

Mullaney suffered severe nerve damage in his neck on August 15 and was on injured reserve by the time that the first regular season game was played on September 13. From then until the day of the strike, Mullaney reported for therapy (ice and ultrasound treatments) at the Vikings' facility each day. Mullaney testified that on September 22 he complained to Fred Zamberletti, the team's head athletic trainer, that he has having more pain than ever and trouble sleeping. Zamberletti, knowing that Mullaney had seen the team's orthopedist and neurologists and that he had had an MRI and a CAT scan, recognized that Mullaney had a very significant injury because it had lasted that long. Zamberletti explained that he had gone as far as he could with his treatment and, with Mullaney feeling worse, maybe Zamberletti had to ''back off.'' Zamberletti told Mullaney that he could not put an aspirin on Mullaney's neck and he had no magic cures. With the strike, this would be a good time for Mullaney to go home and rest and see if that would help, because the progress of his injury was very slow and long lasting. So, Mullaney followed his advice.

About a week later Mullaney called Zamberletti to tell him that he was not doing very well and that he wanted to return to the Club to receive treatment. Zamberletti said that he would arrange an appointment with a neurologist, whom Mullaney saw on September 29. On October 6, the Tuesday after the first replacement game, Mullaney talked to his teammate, Scott Studwell, who said that his striking teammates had decided that, because of the nature of Mullaney's injury and because the team was concerned with his well-being, the best way he was going to help the team in the near future was to get healthy and the way to do that was to report to the team's facility before noon the next day. Mullaney testified that he returned the following morning, saw Lynn, and relayed what Studwell had said that preceding day as the reason he was there. (Lynn had no recollection of any conversation with Mullaney that week.) Lynn said that he could not return and that Mullaney was of no help to Lynn, who had no need for him at that time. Lynn needed players that could play. He was concerned about the team that he had on the field. He needed some talent and he did not have any.

According to Mullaney, Lynn said that the best way that Mullaney could help was to convince some of the other players, some of whom he named, to return. He could not help by coming back. That was not a good idea, and he was concerned about the unity of the team. Mullaney responded that it was the team's decision and his to return at that time, there was nothing further to discuss, and he could not act on behalf of or speak for the other players. Lynn said that Mullaney could not come back unless he resigned from the Union. Mullaney had to send the Vikings a letter by certified mail that he was no longer a member of the Union and that he revoked his checkoff authorization. Mullaney said that he had never heard of such requirements. Lynn said that they were normal and Mullaney should have known about them. When Mullaney asked Lynn to repeat his instructions, Lynn wrote down, saying ''This is what you've got to do and you've got to do it today,'' the following:

> Write a letter saying you resign from the NFL Players Association and that you revoke the dues checkoff authorization.
>
> Send the letter by certified mail.
>
> NFLPA
> 2021 L Street, N.W.
> Washington, D.C. 20036

Lynn instructed Mullaney to see Head Coach Jerry Burns, to whom Mullaney related what he had told Lynn as the reason for his return to the Club. Burns said that he was concerned with team unity, and he thought that Mullaney should stay with the team. Mullaney replied that his return was the team's decision, that his teammates were concerned about his health, and that he was no good to the team injured and it was best for him to get healthy. Burns told him that, if he returned, he should split whatever money he was paid with his teammates; but Mullaney said that that was none of Burns' concern and that he hoped that Burns respected his opinions as he did Burns'. Burns said fine and told Mullaney to see Zamberletti.

Mullaney then went to the training room and told Zamberletti that he was back for treatment. However, Mullaney was scheduled for a myelogram the following day and could not come in then because the procedure took up most of the day; and, because he had to rest for 24 hours after that procedure, Friday was not a good day to have a treatment. Zamberletti said that there was no reason for Mullaney to come in on Saturday, which was a day for a brief practice and then travel, and Sunday was game day, so Mullaney should return on Monday. Mullaney began his therapy that Monday, continued it that week and Monday and Tuesday of the following week, and after that received his therapy at a therapy center owned by Zamberletti through the remainder of the football season. He never returned to the Vikings' facility and remained on injured reserve for the rest of the season. He was not paid for the canceled game and the first replacement game.

Lynn's recollections were different. He testified that on October 7, Mullaney and Mike Mullarkey, another injured

reserve player, returned for treatment. The following day, Lynn read in the newspaper that both players had reported solely for the purpose of receiving treatments and that they were not going to attend meetings or practice with the team or play, even if they were able to. They considered themselves still on strike and intended to join the strikers in their meeting and practices. As a result, on October 8 Lynn met with the team council, which had been established prior to and in anticipation of the strike and consisted of the Union's player representative and his assistant and veteran players at each position, to tell them that players would not be entitled to come in and receive treatment and nothing else. They would be expected to do all the things that they had previously done as injured reserve players and that they were under the direction of the doctor and trainer and coaches and should do whatever they asked.

Lynn expressed his displeasure that the team had allowed only two players to return, while there were other injured reserve players, and asked whether they had been given the same opportunity. When he was told no, he explained his concern that all the players, those on injured reserve and those injured in the last regular season game, should have been given the same opportunity to return and be paid. The players met alone and reported that Mullarkey, whom Lynn had invited to the meeting, had decided that he was not going to cross the picket line and was going to remain on strike. That afternoon, Lynn telephoned Mullaney and repeated what he had told to the team council, including the fact that Mullaney would be treated just as if he were an injured reserve player during the regular season without a strike. Mullaney said that he understood and would continue to report.

The General Counsel moved that I should not permit Lynn and Zamberletti to testify or should strike their testimony on the ground that Lynn had been given a copy of Mullaney's testimony in this proceeding and Zamberletti had been given Lynn's copy prior to testifying in this proceeding. The General Counsel contends that the reading of prior testimony constitutes a violation of the sequestration order entered by me at the beginning of this proceeding. Regrettably, this is not the first time that Sargent Karch, counsel for the Clubs, has been accused of the same conduct. In *Seattle Seahawks*, 292 NLRB 899 (1989), enfd. mem. 888 F.2d 125 (2d Cir. 1989), he showed three of the respondent's most important witnesses the entire transcript of the proceedings which preceded their testimony. Administrative Law Judge Bernard Ries found that Karch had violated the sequestration order (id. at 907) in that proceeding, concluding that:

> a rule expressed as including the obligation of counsel to ''keep their witnesses out if you see them coming in'' should have been reasonably understood by experienced trial counsel as precluding the unrestricted access of prospective witnesses to *verbatim* transcripts of the proceeding. See *Miller v. Universal City Studios*, 650 F.2d 1365, 1373 (5th Cir. 1981). [Emphasis added.]

Judge Ries refused, however, to strike the testimony of the three witnesses. First, he found that most of the transcripts contained testimony of witnesses for the General Counsel. He found that to be ''a matter of no great substantive consequence'' because it is the collusion of witnesses for the same party that is mainly to be prevented, although he noted in footnote 3:

> If the hearing of an *opposing witness* were permitted, the listening witness could thus ascertain the precise points of difference between their testimonies, and could shape his own testimony to better advantage for his cause. The process of separation, then, is here purely preventative; i.e., it is designed, like the rule against leading questions, to deprive the witness of suggestions as to the false shaping of his testimony. 6 Wigmore, *Evidence* § 1838 (Chadbourn rev. 1976) (emphasis in original).

Judge Ries wrote that in proceedings before the Board a respondent frequently has no more than a skeletal pleading and no opportunity for discovery, so that ''the rule should be applied to make it possible for a respondent's counsel to acquaint his potential witnesses with the substance of the testimony given by the Government's witnesses.'' Ibid. He suggested that, if counsel had been unaware that certain testimony would be given, counsel should have applied for his permission to advise the witnesses of the pertinent testimony given for the General Counsel and he would probably have waived the rule to that extent. He added, however: ''This probability does not, of course, detract from my ruling that counsel violated the blanket prohibition of the existing rule by making the transcripts available to the three witnesses without requesting permission to do so.'' Ibid.

Karch showed the three witnesses the testimony of one witness who appeared on behalf of the respondent. Judge Ries found that the three witnesses' testimony should not be struck because the testimony of the one could not have inspired the three to reshape their testimony. In addition, he denied the motion on the grounds that Karch did not knowingly and consciously circumvent the rule and that he was beset by a demanding personal problem. Thus, he explained, Karch probably gave no thought to the implication of the rule when he sent the transcripts to other locations ''solely as an expedient means of trial preparation.''

Finally, Judge Ries cited *Gossen Co.*, 254 NLRB 339 (1981), enfd. as modified 719 F.2d 1354 (7th Cir. 1983), as the Board's last word on the subject (it is still the Board's last word), quoting its ruling at footnote 1:

> Under the particular circumstances of this case, particularly since the parameters of the sequestration arrangement had not been precisely defined and since, in assessing credibility, the Administrative Law Judge was aware that some witnesses had read portions of the transcript prior to testifying, we agree with the Administrative Law Judge that it was not necessary to exclude the testimony of such witnesses. However, in adopting the Administrative Law Judge's ruling on this point, we are not endorsing the proposition that showing portions of the transcript to prospective witnesses who have been sequestered is warranted as part of trial preparation.

The General Counsel concedes that the Board has never approved the striking of testimony because of the violation of the sequestration rule. This is not to say that there ought never to be such a situation, but in any event this is not one

of them for several reasons. Mullaney was a credible, sympathetic, even compelling witness; and I might normally have credited him in full. However, Lynn denied that he had any discussion with Mullaney on October 7 or during that week at the Vikings' facility and that he ever talked with Mullaney about his possible resignation from the Union. He specifically denied that he wrote the above-quoted draft letter. Lynn wrote the same contents while he was on the witness stand. His handwriting sample looked nothing like the draft. Other of Lynn's handwriting samples introduced in an attempt to discredit Lynn failed to even approximate the writing of the draft. I find that Lynn did not write it. The record does not indicate who did; and, although I firmly believe that Mullaney did not fabricate his testimony, I am convinced that he either did not have the conversation with Lynn but with someone else whose identity he forgot, or he talked with Lynn but someone else wrote the memorandum. The General Counsel did not recall Mullaney to clarify the discrepancy, and I reluctantly conclude that the General Counsel has failed to prove this 8(a)(1) allegation by a preponderance of the evidence.

I will not strike Lynn's testimony. That would be most unfair to the Club, which is, on this record, innocent of the Section 8(a)(1) violation with which it is charged and would punish it for the error of its attorney. That is unwarranted in this instance, particularly because the reading of the transcript could not have caused Lynn to alter his handwriting, unless he has perpetrated a massive fraud upon the Board, and I have no hint that he has.

I refuse to strike Zamberletti's testimony also, but not because Karch sent the transcript only to Lynn. Karch should have reasonably anticipated that Lynn would show the transcript to Zamberletti and might have even requested Lynn to do so. Certainly, Karch is not blameless; but, in any event, Zamberletti agreed that he told Mullaney at the beginning of the strike to go home and rest and do nothing. Mullaney, by staying home and not reporting to the Vikings' facility, was following Zamberletti's instructions to the letter. I conclude that the Vikings violated the Act by not paying Mullaney for the canceled game and the first replacement game.[52]

That I have refused to grant the General Counsel's motion to strike does not end matters. I infer that Karch read Judge Ries' decision which issued in 1983. In case Attorney Karch forgot about it, it was attached to the Board's decision which issued prior to the time that the two Vikings' witnesses testified. He must have known that he was found to have violated the rule, and yet he is guilty of the same violation again. His brief recognizes only that the ''provision of transcripts is not a favored means of trial preparation'' but fails to recognize that what he did was wrong. Instead, he relies again, as he did so many years ago, upon the fact that ''he had no other time or manner to prepare Lynn for his testimony.'' I reject that excuse. Counsel for all parties asked for numerous adjournments during this proceeding and never were denied sufficient time to prepare their cases. Karch could have asked for time, but did not.

Karch's claim that the directions to him were never specific enough to give him any indication that he was not to show the transcripts of testimony to other witnesses makes a mockery of this proceeding and his own intelligence. First, he should have been fully aware of his responsibilities from reading Judge Ries' decision. Assuming that he missed the point contained in that decision, and I cannot imagine how he could, I thought that my directions were clear enough so that anybody should have been aware of the obligations of the sequestration rule. When the matter was first raised, because there were no witnesses present, I instructed all counsel to advise all witnesses that they were henceforth not to discuss the content of their testimony with any other witness. During the proceeding, I advised all witnesses, when they completed their testimony, that they were not to discuss their testimony with anyone else. At one point in the hearing, Respondents' counsel objected to my ruling that witnesses, while they were testifying, were not to consult even with counsel during breaks. Although that matter was ultimately disposed of by agreement of the parties, Karch should have been abundantly aware that, as I commented during the hearing, ''witnesses would be prepared to testify to the best of their recollection without having their testimony at all altered or swayed by what they hear from others.'' During the hearing, when a question was raised about whether a union representative should be permitted to remain in the hearing room, he argued that all witnesses were subject to the sequestration rule and that the witness should leave. I am not convinced that he truly thought that if witness A could not discuss his testimony with witness B, Karch could nullify the sequestration rule by sending witness A's testimony to witness B.

What is now important is how to maintain the integrity of Board proceedings if attorneys, who are officers of the court, breach sequestration orders with impunity. The Board has thus far refused to strike testimony, and I think properly so; but there must nevertheless be some appropriate action within the Board's power to ensure that its sequestration orders, which the Board requires to be issued under *Unga Painting Corp.*, 237 NLRB 1306 (1978), are complied with. In this proceeding, particularly, the question raised by Karch's conduct raises the question about his ability to understand that sequestration orders are meaningful and apply to all parties and attorneys, including those parties he represents and himself. Unhappily, he appears not to have understood that orders are issued to be complied with. Karch must learn not to disregard orders of administrative law judges repeatedly and with impunity. The Board is not powerless to ensure the integrity of its own processes. (Section 102.44 of the Board's Rules and Regulations.) I will, therefore, recommend that the Board order a hearing into his conduct and give consideration to whether he ought to be suspended from practice before the Board for a specified period of time.

o. *Carl Powe*

Carl Powe, a wide receiver for the Cowboys, suffered a shoulder separation during training camp and was placed on injured reserve on September 11. Thereafter, he reported to the Cowboys' facility, twice a day, 5 days a week. On September 22, he arrived at his usual time and was asked by the assistant trainer what he was doing there. Powe replied that he was coming in to receive therapy. The trainer said that there was a strike as of midnight, and he told Powe to see Head Coach Tom Landry. Landry, in turn, told Powe to see

[52] Because of this conclusion, it is unnecessary for me to draw any adverse inferences from the material that the Vikings failed to produce pursuant to a subpoena.

Joseph Bailey, the Cowboys' vice president of administration, to sign some papers, so Powe went to Bailey's office where he told Bailey that Landry had sent him to sign some papers.

At this point, Powe's testimony diverges from Bailey's recollections. Bailey did not give Powe any papers, but said that he had to resign from the Union. If he did not resign from the Union, the Union could take action against Powe, such as taking half or all of his paycheck. Bailey added that if Powe came in, it would be with the intent to play, although Powe was on injured reserve. Powe said that he had to consult with his player representative, Doug Cosbie. Powe left the office and did not return to the Cowboys' facility for 2 weeks. Then, after seeing the trainer and Landry, Powe eventually met with Bailey again and told him that ''I was coming in.'' Powe went to receive therapy thereafter and was paid for the next two games.

Bailey testified that he met with Powe in the morning of September 23, having heard that Powe was in the training room and having asked to see him. Powe asked: ''What do I do now?'' Bailey said that he had a choice. He could cross the picket line, come into the team's facility and receive therapy, in which event there were two options. He could remain a member of the Union. However, by crossing the picket line, he might be subject to discipline, fine or expulsion, by the Union. He could avoid that discipline by sending a letter of resignation to the Union. Bailey said that he made clear to Powe that he was not recommending such action. Finally, if Powe did not wish to cross the picket line, he could continue his therapy at an alternate clinic, and the Cowboys would pay for that. Because Powe looked puzzled by what Bailey had said, Bailey repeated all these options. If he did not report for therapy and honored the picket line, he would not be paid for the games that would be played; but he would be paid for the canceled game if he reported for therapy.

Bailey said that he did not tell Powe that he had to resign from the union and that he mentioned resignation only in connection with a Management Council document which he had in front of him and which stated that he could not ''threaten or coerce a player to disavow himself from the union.'' In further support of his position, he noted that when Powe returned to the team's facility 2 weeks later, before the end of the strike, he never asked Powe whether he had resigned from the Union, and Bailey testified that he did not know whether Powe had resigned.

Bailey contended that it was essential that he talk to the returning players, such as Powe, to ascertain that they were ''officially crossing the picket line, so that we could document that for our records.'' Although the Act does not require the Club to document anything, I find that Bailey told a much more probable scenario relating to his dealings with Powe. On cross-examination, Powe admitted that among the items omitted from his narration of his first conversation with Bailey were that Bailey talked about Powe's therapy at the Cowboys' facility; that there were alternate facilities that Powe could be treated at if he so chose; that Powe went there for the next 2 weeks; and that whether Powe resigned from the Union or not was his choice.

The tenor of the discussion, therefore, was that Bailey was not forcing anything on Powe, but he was giving him a choice. Powe misunderstood what Bailey was saying, but he understood enough that he knew that there was a possibility of some adverse monetary effect if he crossed the picket line without resigning. As a result, I find that Bailey did not threaten Powe that he had to resign from the Union in order to return for therapy in violation of Section 8(a)(1) of the Act. I further find that Bailey did not impose any illegal condition which would otherwise have coerced Powe from carrying out his obligation to rehabilitate himself at the Club's facility, as he had done for 10 days prior to the strike. Thus, the Cowboys' failure to pay Powe two game checks did not violate the Act, and I will dismiss these allegations.

p. *Robin Sendlein*

From the foregoing litany of very serious injuries, one may wonder why football is so attractive a game. The injury suffered by Robin Sendlein, a linebacker for the Dolphins since 1985, was particularly frightening. He received a blow to the head during the first major contact drill in the 1987 training camp and suffered from dizziness and double vision. He reported his problem to trainer Bob Lundy, who said what Sendlein had expected to hear—take a few plays and let your head clear and go back in when you feel that you are ready. He followed that instruction and returned to practice; but with each practice, he had recurrences of double vision which became more serious. Finally, on July 26 Lundy arranged for Sendlein to see an ophthalmologist, who said that Sendlein suffered a slight concussion and recommended that he take some time to see if it cleared up. Sendlein did so and for several days did not get into his pads, but just attended meetings and watched practice.

On July 31, he engaged in practice and once again became dizzy and suffered more severe double vision. Lundy arranged for him to go to a hospital, where he had a CAT scan, which revealed no tumor or excessive fluid or enlargement of the brain. The doctor thought that Sendlein had a slight concussion and kept him in the hospital for a few days for observation. Sendlein returned to camp and traveled with the team for week-long scrimmages against the Falcons. Again, he suffered a blow which caused dizziness, now lasting longer, and more severe double vision. Again, there was a rest period and again Sendlein engaged in practice during which, while warming up, he received a blow which was the ''worst bout'' he had had with double vision. On August 12, Sendlein went to the Bascom Palmar Eye Institute (''Institute''), where he was diagnosed as having some dysfunction in the fourth cranial nerve of his right eye. It was caused by head trauma, and Sendlein was told not to have any contact for 6 months.

That message was relayed to Dr. Virgin, the Dolphins' orthopedic surgeon, who met with Sendlein twice on August 13 and in the second meeting told him that he had decided not to let Sendlein play for 6 months, especially because he was worried that there could be damage to other functions which originate in the brain stem. The doctor told Sendlein to meet with Head Coach Don Shula, and Shula told Sendlein that based on his conversation with the doctor he was putting Sendlein on the injured reserve list for the season and asked whether Sendlein had a degree or had a job waiting. When Sendlein replied that he did not, Shula asked whether he would be interested in doing some scouting and, if so, to contact Charlie Winner, the Dolphins' director of player personnel. Shula wanted Sendlein to keep going to his

scheduled examinations at the Institute and to call the trainers after each examination. Shula also said that Sendlein would not have to attend practices or meetings or film sessions or even be at the Dolphins' facility. He should just pack his things and go home, which is what Sendlein did.

His contacts with the Dolphins from this point were minimal. Two days later Sendlein went to the team's facility and asked Winner about the scouting possibilities, and Winner said that he would talk with head scout Chuck Conners and, when they had something ready, they would contact Sendlein. On September 16 he had an appointment at the Institute and reported by telephone to Lundy thereafter. By September 22, the start of the strike, Sendlein had not practiced with the Dolphins since August 12. On October 12 or 13, because he had heard that injured reserve players would not receive their pay unless they went into camp for treatment, Sendlein called Winner and informed him that he would report to the facility the following morning. That Tuesday or Wednesday, according to Sendlein, he met with Winner, who said that he had talked with both Shula and Dr. Virgin and that Sendlein was to attend meetings and film sessions and put on pads and go to practice, and participate in everything but full contact. Sendlein, fearful of being in contact, even in drills that were supposed not to involve contact, but often did, told Winner that he thought that it would not be a good idea for him to participate in the practice sessions. Winner said that that was his decision, and Sendlein left.

Concerned that the Dolphins were changing his status, Sendlein reported to Joe Robbie Stadium when the striking players made their aborted attempt to return to work on October 15. Then he returned on Monday, October 19, when the veterans returned. He met with Shula and asked if he was required to report to practices and attend the meetings. Shula said no, that he should just keep the trainers abreast of his appointments at the Institute. Sendlein went home.

Sendlein is a dedicated player. He was injured the entire 1986 season with knee problems, and he underwent surgery twice. Nonetheless, when he was able to, he engaged in his therapy and went to all team meetings and film sessions and watched practices. Only if he had been advised that he did not have to attend the same meetings and practices in 1987 would he not have done so. The Dolphins do not argue otherwise, except to contend that Sendlein supported the strike and attended a team meeting on October 10 and picketed that day. However, the Act permits him to support the Union, as long as he is not withholding services from the Club. The only service that the Club sought from him were those that were instituted after the strike began and only as a result of the strike. Winner's requirements represented a complete change from what Sendlein was required to do before the strike, which was nothing.

Winner testified that he followed the Council's instructions to the letter. Thus, when Sendlein came to his office on October 12 and 13 (Winner could not recall that Sendlein telephoned the day before), Winner told him that:

> he would have to follow the procedures that were set up by the National Football League, and that was that he couldn't be both a non striker and a striker, meaning that he couldn't be picketing on one hand and then being in our classroom sessions on the other hand, and that he would have to participate in all meetings, like any other non striking player that was in there, and that he would have to do whatever was allowed by the doctor and the trainer, as far as physical activities.

It is the last point, particularly, where Winner differed so from Sendlein. I cannot imagine that Sendlein would have walked out had he been required only to attend meetings. The practices were what would have made him fearful. That, coupled with the representation by Winner that he had already talked with the trainer and Dr. Virgin, who may well have been unaware of the fact that, even in noncontact drills, there is contact, makes it more probable that Sendlein would have left the premises. In addition, I found that Sendlein's powers of recall were much sharper than Winner's, and I was more impressed by Sendlein as a candid witness. I note that Winner testified that he saw Sendlein later that day in the training room, a fact easily corroborated by one of the trainers. Yet no trainer was called to testify. Winner did not deny that Sendlein came to him to ask for a scouting assignment. Yet he testified that he did not know that Sendlein was out for the season, a statement which I find incredible, particularly when coupled with the fact that Winner's assignment was to hire players to fill in for injured reserve players and he could not recall that he hired any player for the season.

Finally, even if I did not credit Sendlein's testimony, Winner admitted that ''during the strike it was a whole new ball game, as far as the injured reserve players.'' Before and after the strike, Sendlein was not required to come to the Dolphins' facility. It was only during the strike that he had to come to the facility, attend meetings and film sessions, and attend practices. That was clearly a change of working conditions imposed solely as a result of the strike. I conclude that the Dolphins violated the Act by their failure to pay Sendlein for the canceled game and the three replacement games.

q. *Liability*

Sendlein's claim shows vividly that the refusals to pay the various players was not the result of independent decisions by the Clubs. Rather, the Management Council had carefully programmed a plan of action in the event of a strike, including detailed instructions about how to deal with the injured reserve players. The instructions may not have covered every eventuality, and they may not have been followed with equal vigor by each of the Clubs; but there is no question that the Clubs were following the Management Council's directives to the best of their understanding. The League was in the middle of critical labor relations, and the Management Council had the authority to fine Club officials for any statement prejudicial to the Management Council in its bargaining. The Clubs must have well understood that any actions they took in disregarding the memoranda they received from the Management Council were equally prejudicial to their bargaining position. The directives here may not have been as strong as the deadline rule, but I am persuaded that the policies for dealing with the injured reserve players were dictated from the top, and that all Respondents share equally the failure to pay the injured reserve players, in violation of the Act.

D. *Bypassing of the Union*

On September 19 the Management Council issued and distributed to all the players a leaflet entitled ''NFL UPDATE '87'' which announced that the Clubs were ready to increase the settlement offer that they had made to the players on September 7. They foresaw even more improvement in the following areas: increased minimum salaries, improved past service pension credits, increased postseason playoff moneys, further liberalization of the system of firstrefusal compensation, dropping the Management Council's proposal to negotiate contracts, new schedule of option clause percentages, discussion of additional aspects of the entry-level wage scale, increased squad size, deletion of a proposal for contract signing deadline, liberalization of line-of-duty disability standards, increased veterans' maximum life insurance benefits, reduced medical deductibles for individuals and families, increased injury protection benefits, increased rental allowances, increased meal allowances, and increased expansion bonuses. The complaint alleges that the Management Council bypassed the Union by making these ''offers'' to the players before ever mentioning them to the Union.

Donlan testified that he met with Upshaw in the morning of September 18 at National Airport in Washington, D.C. and discussed all these matters. He said that the day before he had typed for the meeting two sheets of paper on which all these proposals were listed. In addition, Donlan had prepared the leaflet which tracked his proposals and which he intended to release once his meeting with Upshaw had concluded. While flying from New York to Washington, Donlan reviewed his typewritten list, made some notations, and reviewed the parties' respective positions on each of these matters. After meeting with Upshaw, Donlan reviewed his list, made sure that he had covered everything, and then authorized his office to send the leaflet. Upshaw admitted that he met with Donlan that morning, but he said that Donlan covered hardly any of the items set forth in the Management Council's flyer.

Although I have substantial doubts about whether Donlan reviewed each and every item on his list in the detail which he testified at the hearing—his testimony contradicted in several material and serious respects affidavits which he submitted during the investigative stage of this proceeding, but the inconsistencies and contradictions were not nearly as many as the General Counsel and the Union argue—I find that his narration makes considerable sense and that it is most likely that he made the proposals that he said he did.

During late August, Upshaw was traveling about the country visiting the players of each team. He had no time to meet with Donlan because he was enlisting support for the upcoming strike and was too busy with his membership to meet for collective bargaining. I am not necessarily blaming Upshaw, because I think that he could read management's position well enough. On the vital issue of free agency, the Management Council was not going to give in. Once that could not be settled, not much else of the Union's extensive proposals was particularly meaningful. So it was that the parties had not met for negotiations from August 15 to August 31, and Donlan prepared and hand delivered to the Union on September 7 a new counteroffer which, he says, was intended to break up the logjam. Upshaw told the press that the proposal was ''garbage'' on September 10, 2 days after he had announced that the Union would strike on September 22.

On September 9 Donlan telephoned Upshaw to advise that the proposal was not a final proposal or a ''take it or leave it'' offer. Now that a strike date had been set, Donlan thought that the parties ought to be meeting, and because the CEC was meeting the next day, Upshaw ought to meet directly with the powers-that-be. Upshaw agreed and met, but the reaction he obtained from the committee was anything but hopeful. In no shape or form would management bow to the Union's demand for free agency. The following day Donlan called Upshaw and suggested that they meet at a site where the parties could concentrate on collective-bargaining negotiations, away from the glare of publicity and telephones and press conferences. Donlan's suggestion of Williamsburg was rejected. Upshaw wanted to remain in the Washington area because of the illness of a member of his family and had to be near a major airport. He rejected Philadelphia and even Dallas (the relative lived in Texas), and Upshaw finally said that he would meet nowhere but in Washington.

Donlan then telexed a letter to Upshaw saying that he was prepared to meet and negotiate with Upshaw anywhere he could find space in the Greater Washington area. Upshaw called Donlan that day to say that he would get back to him as soon as he found some locations, and later that night, Upshaw told Donlan where a reservation had been made. For 2 days, September 12 and 13, the parties reviewed Donlan's September 7 proposal, which, to Donlan, resulted in no progress. On Sunday night, September 13, the Management Council prepared an ''NFL UPDATE '87'' which was sent to all the teams the following day or Tuesday for distribution to the players, setting forth its views of the key points of its September 7 proposal. Donlan testified that it was his way to stimulate some bargaining, that his proposal was not the final proposal, that there was still room to negotiate, and that the players should put some ''heat'' on the Union and the player representatives to get negotiations moving. The brochure so states:

> NFL owners believe that through negotiation and compromise, they can reach an agreement without interruption of the 1987 National Football League season.
>
> A solid offer on the table is the best way to stimulate meaningful negotiation. It's not too late to avoid a strike.
>
> . . . .
>
> Owners believe it's important that you know their position. They are committed to negotiate with your representatives. Let your reps know your feelings on the issues.

On September 15, the Union rejected the Management Council's proposals and presented its counterproposal which Donlan termed at the hearing as a ''walk away proposal,'' one that was so expensive (leaving aside the Union's free agency proposal, the remaining demands would have increased costs according to his calculations by $200 million per year) and so unresponsive to his proposal that it was not conducive, in his mind, to further meaningful discussions. After examining it briefly, Donlan said to Upshaw that he would be in touch.

Donlan tried to contact Upshaw on September 16 to no avail. He was able to reach only Berthelsen, who said that he understood that Donlan had been trying to reach Upshaw

and asked what he wanted. Donlan said that it was obvious and left a message that he wanted to talk to Upshaw. When Upshaw did not return Donlan's call, Donlan wrote to Upshaw:

> Tried to reach you by phone yesterday. Spoke with your secretary and Dick Berthelsen asking that they pass on the message that I have been trying to reach you.
>
> The magnitude and late timing of your proposal certainly gives all of us the clear message that you want a strike. It's just plain not anything we can reach for.
>
> In our proposal to you we stated that it ''was not a take-it-or-leave-it proposal'' but rather the framework for a settlement. If our proposal had met with a serious response, we had intended in the subsequent negotiations to add proposals in the retroactive pension area, compensation area, squad size, minimums, and additional improvements in the other economic areas.
>
> Your proposal seems to make that all futile. Notwithstanding that, I believe we owe it to the people we represent to have a face-to-face meeting. With the strike deadline only 4 days away what do we have to lose.

There is much controversy in the parties' briefs about how Donlan transmitted this document and when Upshaw received it. For the purposes of resolving this issue, it is undisputed that Donlan sent his letter on September 17. That afternoon Upshaw called Donlan, and they agreed that Donlan would fly to Washington the following day and Upshaw would meet him at the airport.

The issue concerns what they spoke about, and Upshaw testified that Donlan mentioned hardly anything. My difficulty in accepting Upshaw's testimony is that I cannot understand why Donlan would try so hard to get this meeting and why he would travel to Washington to offer Upshaw as little as Upshaw claimed. The Union contends that his trip was made to provide cover for the publication that he had intended to send out the next day. If it is correct, I would have to find that Donlan's list of items to be discussed (as well as, in part, a report he issued to the Clubs about what he discussed) was an absolute fraud perpetrated by him to convince me that these offers were made on issues that the Union argues were, at best, insignificant.

Although I may have come to certain conclusions about Donlan, that he was cagey, that his language was slippery, that he attempted (as a good negotiator) to avoid answers and commitments, I certainly had no impression that he was dishonest. Rather, his list of areas of improvement that he said that he raised with Upshaw was entirely consistent with the leaflet that he had written on September 13, that his proposal was not the final proposal and that there was still room to negotiate. It was consistent with his letter of September 16, that his earlier proposal was merely the framework for a settlement, which he intended to add to. It was consistent with Donlan's expressed interest to avoid the strike and convince the Union to agree to a new contract without the massive changes in the free agency provisions that Upshaw sought. Thus, it would be consistent for Donlan to prepare and review his entire list while meeting with Upshaw, and I am persuaded that he did.

Upshaw, whose testimony on this issue was often evasive, at least agreed that Donlan had a document in front of him that he would ''occasionally'' look at during the meeting. I find that Donlan did more than that: he made constant reference to his list and covered it fully. Upshaw was not listening to him. Rather, Upshaw was waiting for the magic words of movement on free agency, which really occupied his mind. He knew that there was going to be a strike unless movement were made in that area. He erred when he said that Donlan did not cover all the items on his list. I will recommend that this allegation be dismissed.

E. *The 8(a)(1) Threat by the Patriots*

William Sullivan Jr., the former owner of the Patriots, was a letter-writer. To convince quarterback Lin Dawson that the strike was wrong, he forwarded to Dawson on October 5 a letter that Sullivan had written to a fan in which he stated that the fans were more important than either the players or the owners and that the strike and the players were exposing the Sullivan family to indignities and ''dealing a low blow and maybe a fatal one to the people whose respect we had earned through years of dedicated effort.'' The strike was causing immense monetary damage: $600,000 had to be refunded to the fans for the first game, and the Patriots had lost money from concessions income and revenues. His son, who had borrowed heavily to install a weight room and meeting rooms, was burdened by the strike's financial impact, no less by his hurt feelings because of the strikers' harassment of those people who came to that game. The battle was with the players, ''whose loyalty, for reasons unknown to me, apparently rest with the Upshaws of this world rather than with the fans who have so loyally supported the team or the Sullivans who have never made a profit while they have paid inordinately high salaries to the noble athletes.''

In a letter to Dawson the next day, October 6, Sullivan forwarded another letter he had received from a fan and called particular attention to the fan's praise of Head Coach Raymond Berry and asked Dawson to compare Berry with player representative Brian Holloway, adding: ''I wonder if it will give you pause for thought. I hope so!'' On October 8, Sullivan wrote to Dawson a lengthy diatribe, only the first part is relevant to this proceeding:

> Since you have found time to go to Newark to listen to Jean [sic] Upshaw's rhetoric, and then to go to Chicago to hear further observations by your leader, and you have permitted Brian Holloway to spend most of his time stirring up trouble with our team (the same Brian Holloway who called Raymond Berry a liar), and who in his self-serving way has always looked out for himself rather than the team, I hope you won't mind if I make a few comments to you in writing concerning some of the recent developments which are leading to the destruction of our franchise.
>
> You and some of your associates have constantly said you want to act as a unit. Apparently, the unit that you are talking about is one which blindly follows the likes of Upshaw and Holloway rather than the people like Raymond Berry and the members of my family.
>
> Initially, we concurred with your view that you should act as a unit because I thought you understood, and some of your associates realized, that the team was

> not merely the players but the coaches, the office staff, the scouts and everyone else who contributed to the end product which we call the New England Patriots.
>
> You may recall that I particularly emphasized that part of that team was the fans because without them we would not need the players, coaches, the union leaders, commissioners, television commentators, etc. Apparently, I was mistaken because I felt that the majority of people on our team felt that way—I was wrong and I am paying that price for that stupidity in failing to judge properly the character of our players.
>
> Lin, each week for a number of years in driving up from my home on Cape Cod to the games on Sunday I have been part of a large traffic flow that came from this part of the world to see our team play. Last Sunday there was no traffic and perhaps it was because the loyal supporters who had made the long trip each week realized that the players had no regard for them so they would indicate their disregard for the players by staying away from the game. Evidently, your people weren't satisfied with that because in addition to using the strike to cause people to seek refunds for their tickets they were not satisfied with that alone because the loyal fans who still came were harassed and so far as I am concerned that is the most unfair of all labor practices that I have ever encountered. Perhaps it could be translated into football terms by suggesting that it was a series of clips from the rear delivered by our players (acting as a unit) on our fans who have paid them the handsome salaries which they have received.
>
> Or perhaps it was becasue [sic] they read the Barnstable Patriot, a newspaper which is proud to bear the name which is affixed to our team. I might say that I am not as proud of the Patriots as I once was. Indeed, I am ashamed of them and cannot wait the conclusion of this event to see if I can get someone else to buy the contracts of people who have acted in such an unfair manner.

Whatever one may think of Sullivan's arguments, he has the legal right to try to convince his players of their folly, unless he should make such comments that coerce players in the exercise of their rights which are protected under the Act. One of those rights is the right to strike and the act concertedly to protect what the players believe, for better or for worse, they need. Sullivan had the right to disagree with them and Upshaw and Holloway, but he had no right to threaten them with the loss of their jobs or any other alteration of their employment status. The last paragraph of the quotation contains a clear threat to trade players by selling their contracts, because they acted unfairly in engaging in a strike.

Sullivan's explanations at the hearing do not lack ingenuity. In particular, Sullivan claimed that, whatever the letter may have said, that is not what he meant. That argument simply does not comply with Board law. He threatened that at the end of the strike he was going to find someone to buy the contracts of those who were disloyal to him. Getting purchasers for the players' contracts meant that the players would be under contract to other teams and not the Patriots. No other construction of Sullivan's words is warranted in light of the clarity of his threat.

Sullivan, however, contended that it was well known that he had been in difficult financial straights for some time and had been looking for a purchaser for the Club. That may be so, but he was not writing about selling the entire team. He was writing about selling the contracts of certain individual players, about five or six, he testified, who were causing him trouble and were not giving him the respect which he thought was due to him. His threat was not related to what would happen if the strike continued. He knew what that prospect was, as he wrote much later in his letter, that the continuation of the strike would cause him further financial losses which might cause him to have difficulty in continuing to field a team. He wrote:

> I would like you to know in conclusion that if the players continue to heed the lies and deceits of the union leadership then on each day you will continue to lessen the value of this franchise and to leave it in a position where its present ownership cannot afford to pay the money necessary to field a solid competitive team. Operating under the present collective bargaining agreement we have lost $16,000,000 since the last strike and we simply cannot afford to make that mistake one more time.

In other words, Sullivan was explaining that he was going to continue to operate the team. He was not going to give in to the players' demands and was asking them, for their good as well as his, to end their strike and resume playing.

I do not credit his additional contention that his selling of contracts was the equivalent of selling the franchise. There is no implication that he had given any thought to the sale of the contracts of any member of management or the coaches. Coach Berry was his loyal friend; the strikers were not, although Sullivan testified that his comments were not directed to those former strikers who had since crossed the picket line. Only the then disloyal strikers' contracts were for sale.

Finally, I do not credit his contention that NFL policy prohibited contracts to be sold, therefore, that could not have been what he intended. When a player is traded, he does not have to sign a new contract. His contract goes with him. The player might be worth a future draft choice or another player. That would constitute the consideration for the transfer of the contract. As a player, Lin Dawson could reasonably understand that the sale of contracts meant that some players would not be playing very long for the Patriots. Furthermore, even assuming that there is an official policy against the selling of contracts, there was no proof that the players knew that or that Sullivan would abide by that policy. I conclude that the Patriots violated Section 8(a)(1) of the Act.

F. *The 8(a)(1) Threats by the Cowboys*

The complaint alleges that the Cowboys threatened Kevin Brooks, Tony Dorsett, Ed Jones, and Everson Walls to withhold various contractual moneys and benefits to coerce them to abandon the strike and return to work in violation of Section 8(a)(1) of the Act. Except for Walls, the players returned to their Clubs, arguably as a result of the threats.

The threats resulted from the Cowboys' interpretations of the players' contracts. Each of them was the form NFL player contract which provided for the player's annual salary and

provided that, if the player ''fails or refuses to perform his services under this contract,'' the contract is ''tolled'' and, during the period of such refusal, the player will not be entitled to any compensation or benefits. The Cowboys claimed that the players' participation in the strike constituted a failure or refusal to perform their services and enabled the Club to withhold not only their salary but other payments due under the contract.

1. Kevin Brooks

On July 17, 1985, Kevin Brooks signed a series of four 1-year contracts with the Cowboys for the 1985–1988 seasons. The same day he also signed a deferred compensation agreement providing that he was to be paid an additional $500,000 in 10 equal annual installments of $50,000, beginning on August 1, 1991. The agreement continued:

> It is expressly understood that should Kevin Brooks retire before the expiration of the 1988 season, that [sic] he shall forfeit a pro rata share of said $500,000 deferred compensation bonus on the following basis:
>
> . . . .
>
> Should Kevin Brooks retire before the conclusion of the 1987 regular season he shall forfeit 50%, or $250,000 of the $500,000 deferred bonus.
>
> . . . .
>
> None of the following [shall] be considered ''retirement'' under the terms of this agreement:
>
> 1) Missing team meetings
> 2) Being late for team meetings or therapy
> 3) Being placed on injured reserve by the team
> 4) Missing games due to football injury during the season at the instruction of the team doctor.

Brooks joined the strike at the beginning but rejoined the Cowboys on October 7, 10 days after Cowboys' vice president, Bailey, forwarded to him an opinion letter from the Cowboys' attorneys about ''your current contract status.'' The letter stated, in part:

> A provision is contained in the Compensation Agreement whereby should the Player ''retire'' before certain established periods of time, there will be a forfeiture of a portion of the $500,000 deferred bonus. The term ''retire'' or ''retirement'' is not defined affirmatively. However, the next to the last paragraph defines certain events that are not to be considered ''retirement'' under the terms of the Compensation Agreement. It is our opinion that, by reason of the fact that the parties have defined what is not to include retirement, other failures on the part of Player which are indicative of ''retirement'' should be deemed to be a ''retirement'' under the Compensation Agreement. Thus, the failure to attend practices and the failure to attend and perform at games should constitute ''retirement'' within the meaning of the Compensation Agreement.
>
> However, I call your attention to the last paragraph of the first page of the Agreement which reads: ''In the event that . . . the Club deems that Player has in fact retired, the Dallas Cowboys, before they can create a forfeiture under this Agreement, must give [Player] ten days notice, by registered mail, return receipt requested of their intention, to exercise their right to cause a forfeiture under this Agreement. During that ten day period, [Player] has the right to withdraw his notice to retire or 'cure the default', in which event, no forfeiture of any funds shall take place. . . .'' Thus, it is our further opinion that, in order to ''trigger'' a forfeiture, the Club must give the Player the ten days notice by registered mail, return receipt requested, of such intention to exercise the Club's right to cause a forfeiture under such Agreement. A draft of the proposed letter is attached hereto.

No draft of the proposed letter was enclosed in Bailey's letter to Brooks.

2. Tony Dorsett

On October 2, 1985, Tony Dorsett signed a series of five 1-year contracts for the 1985–1989 seasons which provided, among other things, for his salary, which in 1987 was $450,000, and, in addition to other ''consideration'' paid or payable to Dorsett, the following annual payments: from 1990-1993, $100,000, and from 1995–2014, $300,000. Paragraph 27 of each contract provided the manner in which these payments would be prorated:

> Player, or his designated beneficiary or estate, shall receive the rights and benefits provided in this Paragraph 27 regardless of (A) Player's football-related illness, injury or death, or (B) Player's inability (except for such inability as is caused by illness, injury or death due to a non-football-related cause) to exhibit sufficient skill or competitive ability sufficient to participate in the National Football League. However, if, during the terms of the Contracts, (A) Player fails to report to the Club's training camp and practice sessions, or (B) Player fails to perform his contractual services except for failure caused by football-related causes, or (C) Player suffers a non-football-related illness or injury or dies because of non-football-related causes, or (D) any of the Contracts are terminated, tolled or do not come into effect for reasons other than any football-related illness, injury or death or Player's inability (except for such inability as is caused by illness, injury or death due to a non-football-related cause) to exhibit sufficient skill or competitive ability sufficient to participate in the National Football League, then all such rights and benefits under this paragraph 27 shall be reduced pro rata. Such pro rata reduction means a reduction of each of such payments so that the required payment is equal to the payment otherwise required multiplied by a fraction, the denominator of which shall be 60 and the numerator of which shall be the number of months which elapse from February 1, 1985 until the occurrence of the event which causes such reduction.

Paragraph 28 provided that the Cowboys agreed to purchase real property valued at $350,000 on or before April 1, 1986, and hold it until October 1, 1990, at which time Dorsett would have the option of purchasing it for $100 or selling it to the Cowboys, who would pay him $750,000. His right to receive the full undivided interest in the property or to receive the full amount promised for 1990 was to be re-

duced pro rata for the same reasons that would permit the prorating of the annual payments described in the above quotation. Finally, the contract acknowledged that the Cowboys had loaned Dorsett $750,000 and committed him to repay it by October 15, 1990. However, a portion of the debt, prorated in the manner set forth in paragraph 27, was to become payable if the same reasons, as above, occurred.

By letter dated September 29, Tex Schramm wrote to Dorsett, enclosing copies of letters containing the consequences to Dorsett if he should refuse to play during the strike. According to the Cowboys' attorneys, should Dorsett fail to report to the Cowboys' practice sessions or fail to perform his contractual services, then the amounts due for annual payments would be reduced pro rata. According to their formula, the reduction was computed to be 29/60 or $3,093,000. The same formula was applied to Dorsett's option to buy real estate, for which Dorsett was to forfeit either 29/60 of the value of the property or his right to receive the $750,000. Finally, there would be an immediate acceleration of the outstanding amount of the loan. Dorsett had initially joined the strike but, after receiving this letter, he returned to the Cowboys on October 2.

3. Ed Jones

On December 30, 1986, Ed Jones signed two 1-year contracts with the Cowboys for the 1986 and 1987 seasons. The 1987 contract provided that his salary was to be $225,000. However, a supplemental agreement also provided:

> 2. *1987 Contract*. In addition to the compensation of $225,000.00 set forth in Paragraph 5 of Player's 1987 Contract, Club will pay Player:
>
> A. Four (4) consecutive annual payments of $75,000.00 consisting of quarterly payments of $18,750.00 each beginning March 31, 1989 and ending on December 31, 1992.
>
> B. Twenty (20) consecutive annual payments of $33,333.34 consisting of monthly payments of $2,777.78 each beginning Jan. 1, 1996 and ending on Dec. 31, 2015.
>
> 3. Player will receive the additional compensation set forth in Paragraph 2 if Player is on Club's active roster for the 1987 Football Season or is placed on Club's Injured Reserve at any time during the 1987 Football Season including training camp. Player will not receive such additional compensation if Player retires, refuses to play or report to Training Camp, or does not make Club's final active roster for the 1987 Football Season.

On September 29, Bailey forwarded to Ed Jones and his agent an opinion letter from the Cowboys' attorneys concerning Jones' failure to report for practice sessions from September 22 to the date of the letter. Noting that Jones was entitled to receive two separate series of deferred payments in addition to his 1987 compensation to be paid that year, the attorneys opined that, because the agreement provided that Jones would not receive the extra compensation ''If Player . . . refuses to play . . . for the 1987 Football Season,'' Jones was not entitled to any of the additional compensation.

4. Everson Walls

On May 18, 1987, Everson Walls signed four 1-year contracts for the 1986–1989 seasons. His 1987 salary was $350,000, and the Cowboys also agreed to pay him deferred compensation and a reporting bonus, as follows:

> 24. In addition to the compensation of three hundred fifty thousand dollars ($350,000.00) set forth in Paragraph 5, if at any time during the period November 1 through November 7 of the current contract year, (except for failure caused by football-related causes or by this contract and paragraph being terminated, tolled or not coming into effect for reasons other than any football-related illness, injury or death or Player's inability to exhibit sufficient skill or competitive ability sufficient to participate in the National Football League), Player is on Club's active squad or injured reserve, Club will pay to Player, or in the event of Player's death, to Player's stated beneficiary, or if none, to Player's estate, thirty (30) equal consecutive annual installments of twenty-eight thousand dollars ($28,000.00) each. These installments shall commence on November 1, 1996, and shall terminate after the final installment has been paid on November 1, 2025.
>
> 26. For the 1987 season only, the following applies: In addition to the sum of three hundred and fifty thousand dollars ($350,000.00) set forth in Paragraph 5, Club will make a payment of one hundred-thousand dollars ($100,000.00) to Player on the date of his reporting to pre-season training camp in July as per Club's instructions to veteran players and Player must pass the Club's training camp physical. However, if Player fails to practice, play, or to perform his contractual services except for failure caused by football-related causes, or player suffers a non-football-related illness or injury or dies because of non-football-related causes or any of the contracts are terminated, tolled or do not come into effect for reason [sic] other than any football-related illness, injury or death or player's inability (except for inability as is caused by illness, injury or death due to a non-football-related cause), to exhibit sufficient skill or competitive ability sufficient to participate in the National Football League, then all such rights and benefits due player by Club shall be reduced by said amount.

An addendum provided, in part:

> 1. In the event Player is unable to pass Club's 1987 pre-season physical as a result of a 1986 season football injury, Club will pay Player the annual installments he would otherwise have qualified to receive under Paragraph 24 of Player's 1987 NFL Player Contract.
>
> 2. In the event Player retires or is traded or released by the Club before November 1, 1987, so that he does not complete performance of Player's 1987 NFL Player Contract, Club agrees, if Player so desires, to obtain from reputable insurance company of Club's selection an insurance policy which will provide Player the deferred payments he would otherwise have received under Paragraph 24 of Player's 1987 NFL Player Contract provided:

A. Player is insurable and Player pays on or before November 1, 1987, the premium on the insurance policy in an amount not to exceed one hundred twenty thousand dollars ($120,000.00).

B. Player is not entitled to receive such payments in accordance with Paragraph 1.

On September 30, Bailey wrote to Walls and his agent, Steve Weinberg, stating that he had received inquiries from other players about the ramifications of the strike and he felt that, even though they had not inquired, it was his obligation to advise them, too. Like the other letters, the enclosed attorneys' opinion letter did not spare any threats of an adverse financial impact. The attorneys stated that Walls' contract had been designed with a view that there would be a strike and that Walls would join the strike and not perform his contractual services. The letter stated that Walls would have to return $100,000 that the Cowboys paid when he reported to the training camp that summer. He would lose all of his deferred compensation of $840,000 under paragraph 24, quoted above, and his game pay for each game that he missed as a result of the strike.

Walls was the only player who did not return to the Cowboys upon receipt of the Club's communication. However, the Cowboys did not withhold any moneys from Walls, except for his game salary, as to which the General Counsel makes no complaint.

5. Discussion

The Cowboys threatened to withhold payments of substantial sums from the four players if they opted to continue striking. The right to strike, as noted above, is protected by Section 7 of the Act. It may be waived only if the individual player contracts clearly and unmistakably waived the players' right to strike. *Texaco, Inc*., 285 NLRB 241 (1987); *Amoco Oil Co*., 285 NLRB 918 (1987). The General Counsel contends that the threats to withhold contractual payments because the players were on strike are illegal because the players never waived their right to strike. The Club frames the issue differently: ''whether the players have a right to both strike *and* receive deferred salary and other compensation that contractually is contingent upon the players' provision of services to the Cowboys.''

The Cowboys, no less than any other Club, had no responsibility to support the Union's strike. The Cowboys did not have to pay their players when the players voluntarily withdrew their services. The pertinent issue is whether the amounts that the Cowboys threatened to withhold were directly related to their salary for the missed games or whether the Cowboys were otherwise permitted to withhold the payments because of other valid clauses in the players' contracts. I conclude that the Cowboys violated the Act, because the actions of the Club had the inherent tendency to inhibit the players' participation in protected and concerted activity.

The allegations involving Brooks are the simplest to resolve. Brooks was to be paid a deferred bonus of $500,000 unless he retired before the end of the 1987 season. ''Retired'' is not defined, except that there are four events which the contract states will not be considered a retirement, including missing games because of an injury. The contract does not forbid Brooks from striking, but the Cowboys nonetheless argue that his honoring the picket line is a retirement. I disagree. With the parties' agreement of what would not constitute a retirement, I cannot avoid the normal meaning of the word to give it some new meaning which would not coerce employees from engaging in activities protected by the Act. Webster's Ninth New Collegiate Dictionary defines retirement as ''withdrawal from one's position or occupation or from active working life.'' There is a permanence about the withdrawal, and not the mere transient activity of a strike of short duration.

Under the Cowboys' argument, Brooks' injury for a period of 3 weeks would not be a retirement because it is one of the events that the contract states is not considered a retirement, but his illness of 1 week would be a retirement because it is not one of the four events that are not considered a retirement. I simply cannot agree with such a forced interpretation of the agreement and the plain meaning of the word. All that Brooks did was engage in an economic strike. Section 2(3) of the Act includes within its definition of ''employee'' an individual ''whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . and who has not obtained any other regular and substantially equivalent employment.'' *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969). There is no suggestion that Brooks obtained employment with anyone else, and he continued to be an employee, not a retiree.

The Cowboys also argue that no matter how one would interpret the word ''retire,'' the letter was not a threat because Brooks' contract required the Cowboys to give him 10 days' notice of forfeiture and that he then had the right to cure any default within those 10 days. The Cowboys contend that the letter merely was an opinion of what the team could do rather than the actual exercise of the team's right to cause a forfeiture. As admirable as this purpose may have been, the Cowboys knew that Brooks was a football player and not expected to have a legal degree. Even to a lawyer, a reading of the document expresses a threat that one-quarter of a million dollars would be lost if Brooks remained on strike. Sophistry is no substitute for the clear intent of this document to get Brooks off the picket line and back to the playing field.

To the same extent, the Cowboys' attorneys completely misconstrued Jones' contract in order to force him to return from the strike. To repeat what I have stated above, I have no difficulty with the concept that an employer has no duty to pay an employee if he strikes and does not perform his work. What the Cowboys tried to do, however, was punish its players for engaging in protected and concerted activities. Instead of relating the amount Jones was to forfeit to his salary and to a proportion of his deferred compensation, the Cowboys construed Jones' contract to mean that if he missed one game, he forfeited everything. According to the letter, Jones forfeited his base salary of $225,000, plus his deferred compensation of $966,666 ($300,000 from 1989 to 1992 and $666,666 from 1996–2015), a total of $1,191,666. For missing the first strike game, 1 of 16 games of the year, the Cowboys threatened to take away almost a million dollars, more than 80 percent of his pay, plus, of course, the per game rate of one-sixteenth of $225,000, a clearly Draconian penalty. It is more than Draconian. It is unjustified by any reasonable reading of the contract, which was clearly intended to protect the Cowboys from paying any deferred compensation if Jones did not make the team, or retired, or

refused to report to training camp or refused to play the season.

The Cowboys made the same unreasonable and irrational assumption regarding Dorsett. That Dorsett joined the strike for a few days would be the end of his football career. For not showing up at one game, he would lose $4 million, more than 2 years of future benefits, and he was still bound, if he quit the strike, to play for the Cowboys, but only for his base salary. Surely, that was not contemplated by the parties.

Both Dorsett's and Walls' contracts provide that, if the player fails to perform his contractual services, ''except for failure caused by football-related causes,'' then the deferred yearly payments shall be reduced. If the basis of the Cowboys' defense is that it was not required to pay wages for services not voluntarily performed, then it is understandable that it would not pay the salary for that game, to wit, one-sixteenth of the year's compensation, plus any deferred compensation which was directly attributable to the game that was missed. The Cowboys' position was wrong because its threat was so far removed from the wages for any single game that it was totally unreasonable. It was a penalty, imposing such a loss of money for remaining on strike that it tended to coerce the players to rethink their position of support for the Union's collective action.

Furthermore, the threat to Walls of the loss of his annual payments utterly omits the contractual language that Walls was entitled to those installments of $840,000 if he was on the Cowboys' active or injured reserve rosters during the period of November 1 through 7. The Cowboys' letter was dated at the end of September; and if Walls was to lose any of his deferred payments under paragraph 24, clearly the Cowboys threatened him much too early.

With this kind of thoughtless and unjustified action, it is difficult to take seriously Bailey's explanation for his threat to recapture Walls' $100,000 reporting bonus. It is true that Walls' agent unsuccessfully attempted to insert in the contract a provision which would specifically exclude Walls' participation in the Union's strike as an excuse for the Cowboys not to pay any amounts (other than base wages) otherwise due under the contract. However, while Bailey would not agree to such an exclusion, he agreed that the labor laws would govern whether Walls would receive these payments.

The negotiating history reveals that, starting in 1986, Walls renegotiated his 1986 and 1987 agreements, which had left open the amounts that he was to receive for those 2 years. One of his demands was for more money ''up front,'' and it would certainly would not have been baseless for the Cowboys to contend that some of the reporting bonus was actually salary. But the Cowboys did not link their threats to salary. Rather, the penalty that they sought to impose was not reasonably related to salary or to the games missed by Walls.

Finally, the Cowboys argue that their letter was only a prediction of what would happen if Walls remained on strike in the future, noting that the letter begins:

> Our firm has been asked by the Dallas Cowboys to review Everson Walls' 1987 NFL Player Contract together with the Addendum to his Player Contract to determine the financial impact upon Everson Walls, if he remains on strike and does not perform his contractual services and to practice and play for the Dallas Cowboys.

There was no language later in the letter predicting anything. All threats were couched in the present because of acts which had already occurred. The attorneys wrote that Walls ''has sustained the following financial impact'' for his failure to practice and perform for the Cowboys. Regarding the $100,000 reporting pay, the attorneys wrote that Walls ''will have to return'' the money. Regarding the deferred pay, they wrote that he ''has forfeited the deferred compensation.'' I find that by sending this letter, the Cowboys did not intend to casually predict future punishment. They intended to send a very clear message setting forth all the monetary penalties that they intended to impose if Walls continued to strike. That threat was finite and immediate.

I find that the Cowboys violated Section 8(a)(1) of the Act in all respects alleged in the complaint.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondents set forth above, occurring in connection with their operations described above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondents engaged in certain unfair labor practices, I shall recommend that they be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall recommend that Respondents make whole all of their players who offered to return or for whom the Union offered to return to play in the games scheduled for October 18 and 19 for any loss that they may have suffered as a result of Respondents' discrimination against them. Backpay shall be in an amount equal to the pay for one game, to wit, one-sixteenth of the player's annual wages, and interest shall be added thereto, to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The identity of these players may raise problems. Not all the almost 1100 striking players appeared at their teams' facilities on October 15 and 16. Some were out of town. They may not have been able to have returned to their teams in order to prepare for the games, which I find, adopting the testimony of Stan White, would be no later than 9 a.m. local time, on Saturday, October 17, for those playing on Sunday, and 9 a.m. on Sunday for those playing on Monday. That would have given the players who had home games all day to learn a game plan. Players might have had to report earlier for away games, as, for example, the Rams' players who reported on Friday morning, the day that they were leaving for Atlanta. All questions of eligibility for backpay under this decision will be referred to the compliance proceedings.

The General Counsel and the Union also request that the players, in order to be made whole, should be given a pro rata adjustment of any of the incentives set forth in the employees' contracts which may have been adversely affected by the exclusion of these employees from these games. This request is warranted. Many players receive extra moneys if,

for example, they gain a certain number of yards during the season or make a certain number of tackles. Respondents' refusal to permit the players to play in the October 18 and 19 games may have adversely affected the players' ability to reach the number which they would have to attain to be eligible for their incentive bonus. To the extent that these can be calculated, the players shall be awarded an amount equal to the average of the amount of the pertinent category of football accomplishments, to wit, tackles, completed passes, running yardage, minutes played, etc., computed from the games that the players played. Interest computed as set forth above shall be added to these amounts.

Finally, the General Counsel and the Union contend that the players should also reimbursed playoff moneys for the players of any teams that did not qualify for the playoffs but might have qualified under any permutations or combination of results had the outcome of the October 18 and 19 games been different. The gist of this request is that if the strikers had been allowed to return and to play that weekend, the results of the games would have been different. There is, however, not the slightest bit of proof that the result of any game would have changed, nor has there even been a showing that even if I were to hypothetically change the results of all the games that weekend, the final results in any of the divisions would have changed. The relief that is being asked for is to selectively alter the results of the games to permit any team which did not make the playoffs to make the playoffs, with the possible curious result that many more teams might have made the playoffs than there were spots to qualify.[53] Board relief is intended to make discriminatees whole for their reasonable losses and not to reward them with speculative enrichment. I deny the relief, noting my surprise that the General Counsel and the Union did not ask in addition for a recomputation of the results of the playoffs, thus making every team eligible for Super Bowl money and rings, which is just as speculative as the relief sought and is the natural consequence of what they seek as a remedy.

[53] Playoff spots are sometimes selected by matching the total number of points scored. I do not know whether it was the intention of the General Counsel and the Union to improve the possibility of one team's qualification by making it the winner of their fictional game by 500 points.

I shall also recommend that Respondents make whole all of their players who were on injured reserve status and who were not paid their game checks during the strike. They are entitled to four game checks, unless a lesser number is set forth below, during the strike: James Demerritt (one), Tim Richardson, Tim Wrightman, Lew Barnes (one), Steve Fuller, Albert Bell (three), Derrick Crawford, Brad Booth, Nick Haden, Dupre Marshall, Martin Booker, Steve DeLine, John Klingel, Ken Lambiotte, Mike McCloskey, Ron Moten, Alan Reid, Ben Tamburello, James Geathers, Chris Godfrey, Mike Hamby (three), Jeff Price, Jeffrey Nowinski, Woodrow Lowe (one), Mark Mullaney (two), and Robin Sendlein. Interest will be added to the amounts due, in the manner prescribed as set forth above.

The General Counsel has requested that the Cowboys expunge the threats that they issued to Brooks, Jones, Dorsett, and Walls and notify them that they will not enforce the threats. The Cowboys specifically oppose this relief, but I find it clearly warranted. Although none of the threats have been enforced, the players should be advised that these threats, which involve a potential penalty of millions of dollars, never will be enforced. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982).[54]

Finally, the General Counsel seeks a broad cease-and-desist order. Although there is little question that the backpay required under my order will amount to millions of dollars, the unfair labor practices found are not so egregious or widespread as to demonstrate a general disregard for the employees' fundamental statutory rights. Rather, Respondents' refusal to permit the players to return to work and its withholding of their pay for that weekend was a one-time discriminatory act with a rule that had its inception only several weeks before and, once the strike had terminated, lapsed into obscurity, but for the continuing litigation in this proceeding. Similarly, the failure to pay the injured reserve players no doubt was serious, but hopefully will be adequately corrected by the specific relief granted herein. The other violations found are not major. *Hickmott Foods*, 242 NLRB 1357 (1979).

[Recommended Order omitted from publication.]

[54] I requested the General Counsel to submit a proposed order setting forth the entire relief that he sought in this proceeding. He did not include therein, and I have not considered, the claim for attorneys' fees incurred by Walls in answering the Cowboys' threat.